Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES LEE SEMPLE, JR.,
Administrator of the Estate of Deborah Louise Semple, Deceased, et al.,
Petitioners,

v.

THE CITY OF MOUNDSVILLE,
a Municipal corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Moundsville Police Department's actions demonstrated a deliberate indifference toward Mr. Suarez's violent and illegal behavior directed at Deborah Semple, thereby emboldening and encouraging Mr. Suarez to escalate his illegal behavior and eventually murder Deborah Semple, constitute sufficient grounds to find that the Moundsville Police violated Deborah Semple's Fourteenth Amendment rights.

Whether the Fourth Circuit erred in holding that James K. Garrison and Scott Semple may not maintain claims of procedural due process violations under §1983.

Whether the Fourth Circuit erred in holding that the record does not create a genuine issue of material fact concerning the existence of a municipal policy or custom which led to Moundsville's constitutional violation.

PARTIES TO THE PROCEEDING

Petitioners

The petitioners are CHARLES LEE SEMPLE, JR., Administrator of the Estate of Deborah Louise Semple, Deceased, AMANDA LONE SUAREZ, a minor, by CHARLES LEE SEMPLE, JR., her grandfather and guardian, and ANGELA MARIE SUAREZ, a minor, by CHARLES LEE SEMPLE, JR., her grandfather and guardian; THERESA A. SEMPLE, Administratrix of the Estate of Scott A. Semple, Deceased; and KERMIT Z. GARRISON, Administrator of the Estate of JAMES K. GARRISON, Deceased.

The petitioners have no corporate affiliations.

Respondent

The respondent is City of Moundsville, West Virginia

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 195 F.3d 708 (4th Cir. 1999). A copy of the Opinion is included in the Appendix at 1a. The Opinion of the United States District Court for the Northern District of West Virginia is reported at 963 F.Supp. 1416 (N.D.W.Va. 1997). A copy of the District Court's Opinion is included in the Appendix at 14a.

JURISDICTION

On October 5, 1999, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court for the Northern District of West Virginia. No rehearing was sought. This Petition was filed within 90 days of the Fourth Circuit's October 5, 1999 Order. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

42 U.S.C. §1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * * * *

West Virginia Code, §48-2A-10c Arrest for violations of protective orders

(a) When a law-enforcement officer observes any respondent abuse the petitioner and/or minor children or the respondent's physical presence at any location in knowing and willful violation of the terms of a temporary or final protective order issued by a magistrate, a circuit court judge or a family law master under the provisions of this article or subdivision (12), section (a), section thirteen [§48-2-13(a)(12)], article two of this chapter granting the relief pursuant to the provisions of this article, he or she shall immediately arrest the respondent.

(b) When a family or household member is alleged to have committed a violation of the provisions of section ten-d [§48-2A-10d] of this article, a law-enforcement officer may arrest the perpetrator for said offense where:

(1) The law-enforcement officer has observed credible corroborative evidence, as defined in subsection (b), section fourteen [§48-2A-14*b(] of this article, that the offense has occurred; and

(2) The law-enforcement officer has received, from the victim or a witness, a verbal or written allegation of the facts constituting a violation of section ten-d [§48-2A-10d] of this article; or

(3) The law-enforcement officer has observed credible evidence that the accused committed the offense.

BEST AVAIL

STATEMENT OF THE CASE

PROCEDURAL POSTURE

On February 17, 1995, Charles Lee Semple, Jr., Administrator of the Estate of Deborah Semple, Amanda Lone Suarez, a minor, by Charles Lee Semple, Jr., her grandfather and guardian, and Angela Marie Semple, a minor, by Charles Lee Semple, Jr., her grandfather and guardian filed suit in the United States District Court for the Northern District of West Virginia against the City of Moundsville, seeking damages under 42 U.S.C. §1983 and state tort law, at Civil Action No. 5:95CV17. On that same date, Theresa A. Semple, Administratrix of the Estate of Scott Semple, deceased, filed a similar action against the City of Moundsville in the same court at Civil Action No. 5:95CV18.

On May 25, 1995, the Plaintiffs in 5:95CV17 filed an amended Complaint. On May 30, 1995, Plaintiff in 5:95CV18 also filed an amended Complaint. On July 15, 1995, Kermit Z. Garrison, Administrator of the Estate of James K. Garrison, deceased, filed a civil action similar to the two prior Complaints at Civil Action No. 5:95CV96. After denying the Defendant's Motion to Dismiss, the District Court consolidated all actions for purposes of discovery and trial. Jurisdiction was conferred upon the District Court by 28 U.S.C. §§ 1331, 1332, 1343, and 1367.

On February 4, 1997, the Defendant filed a Motion for Summary Judgment on all claims. The District Court entered an order on April 28, 1997 granting the Defendant's Motion for Summary Judgment and dismissing all of the Plaintiffs' claims. Plaintiffs appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's Order on October 5, 1999.

BLE COPY

Plaintiffs seek permission to appeal the Fourth Circuit's October 5, 1999 Order as it pertains to plaintiff Deborah Semple's claims under 42 U.S.C. §1983.[1]

UNDERLYING FACTS

This case arises out of the deaths of three innocent people, Deborah Semple, Scott Semple and James Garrison (hereinafter sometimes referred to as "Deborah", "Scott" and "James"). On August 6, 1994, Deborah, Scott and James were murdered by Michael Suarez (hereinafter sometimes referred to as "Suarez"). Deborah and Suarez had two children, Amanda Lone Suarez (hereinafter "Amanda"), a minor, and Angela Marie Suarez (hereinafter "Angela"), a minor, both of whom are Plaintiffs in the instant action.

Prior to her murder, Deborah Semple was the victim of a dysfunctional and harmful relationship with Suarez which she decided to terminate in January of 1994 -- approximately 8 months before her death. (Joint Appendix, hereinafter "J.A.", Volume 5, p. 2046).[2] The record before this Court, as set forth below, evidences a tragic irony, to-wit; that as Deborah resolved to break free from her harmful relationship with Suarez, she -- and those close to her -- became victims of what proved to be an equally harmful and dangerous relationship with the Moundsville Police Department.

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[1] The Fourth Circuit did not specifically address plaintiffs' §1983 claims in its October 5, 1999 Opinion; rather, the Fourth Circuit adopted the District Court's April 28, 1997 Opinion as it pertains to those claims. (App. A at 13a.)

[2] The Joint Appendix ("J.A.") before this Court is identical to the Appendix that was filed with the Fourth Circuit in connection with Plaintiffs' appeal to that Court.

Deborah and Suarez lived together from 1982 until Deborah decided to end the relationship in the early part of 1994 (J.A. Vol. 5, pp. 2047 and 2048). Their children, Amanda and Angela, were born while they lived together. While Deborah and Suarez lived together, he, at times, would commit acts of domestic violence against her. As early as 1987, approximately seven (7) years before her death, the Moundsville Police Department (hereinafter sometimes referred to as "Moundsville") was advised, by Deborah, of Suarez's abuse. (J.A. Vol. 5, pp. 2049 and 2050).

One of the more significant and well documented instances in which the Moundsville Police Department became aware of Suarez's abuse occurred on January 15, 1989. On that date, Deborah called the Moundsville Police Department from 110 Poplar Grove, her residence with Suarez at the time. (See relevant portions of Moundsville Police logs containing information regarding Deborah and/or Suarez. (J.A. Vol. 5, p. 2052)).[3] Patricia Rodgers (Deborah's mother) also called the policy station and advised that Suarez had become violent and had a gun. (J.A. Vol. 5, p. 2171). The police arrested Suarez, and Deborah filed a domestic violence complaint against him. (J.A. Vol. 5, p. 2171). Suarez posted bond and was released from jail less than four (4) hours later. (J.A. Vol. 5, p. 2053). On January 25, 1989 Deborah dropped the charges she had filed because Suarez threatened her with violence if she did not do so. (J.A. Vol. 5, p. 2172).

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[3]The police logs that pertain to Deborah and/or Suarez are contained at Appendix, Volume 5, pp. 2051-2170. They were introduced and identified at the deposition of Police Officer Michael Richmond and were testified to as being prepared by the dispatchers on duty at the time, and typed shortly after the information contained therein was received.

Specifically between January of 1989 and June of 1994, both Deborah and her mother frequently contacted the police and advised Moundsville of the abusive conduct of Suarez toward Debbie during that period of time. (J.A. Vol. 5, pp. 2188-2189). The record is bereft of any investigation, involvement or response being made by Moundsville in response to any of these calls during that period of time. Moreover, between January of 1994 and June of 1994, Moundsville was contacted a total of more than six (6) times by Deborah, her mother and brother, Scott, and advised of the abusive conduct of Suarez toward Deborah. (J.A. Vol. 5, p. 2190-2193). Again, the record is bereft of any investigation, involvement or response being made by Moundsville concerning any of these calls during that period of time.

On June 21, 1994, Deborah called the Moundsville Police Department in the early morning hours, reporting that Suarez had entered her house without her permission and had sexually assaulted her and threatened to kill and dismember her and her mother. She also advised that he had loaded guns in his possession, and that her two children were still at the residence with him. (See, Family Violence Petition of 6/21/94 at J.A. Vol. 5, p. 2194). The Moundsville Police arrived at the location from which Deborah had made the call and escorted her to her house. (J.A. Vol. 5, pp. 2195 and 2196). When they arrived, Suarez was still at Deborah's residence. (J.A. Vol. 5, pp. 2195 and 2190). Despite this, no arrest was made.

Plaintiffs' expert, Patricia Valentino Kutch, Esquire, opined that upon arriving at the house at this time, the police could have arrested Suarez and charged him with various felony offenses, including nighttime burglary, sexual assault, misdemeanor weapons violations and domestic violence charges. (See Report of Plaintiffs' Expert Patricia Kutch,

Esquire at J.A. Vol. 1, pp. 238-239). Officer Dean Whipkey testified at his deposition that Deborah did not want the police to arrest Semple at the scene. (J.A. Vol. 5, p. 2202). Of note, of course, is the uncontrovertible fact that Deborah swore out the criminal complaint -- that very same day. Moreover, as of June 9, 1994 the law in West Virginia changed such that a police officer could make an arrest solely upon statements from a victim and/or other witnesses. (Deposition transcript of Officer William F. Kaemmerling, p. 57 and Deposition Exhibit 4, at J.A. Vol. 5, p. 2203).

As a result of Deborah's efforts, a temporary protective order was issued which, among other things, prohibited Suarez from abusing, contacting, communicating or harassing her. (J.A. Vol. 1, pp. 321 and 322). Additionally, the temporary protective order stated that Suarez was to stay away, not only from Deborah, but also from her mother and family. Thus, as early as June 21, 1994, the Moundsville Police Department had actual notice that Suarez posed a threat not only to Deborah but also to her family members and others close to her. In accordance with Moundsville policy, the protective order was kept on file at the police department so that it could be accessed by the dispatcher each time a call concerning the parties was received. (See Moundsville Police Department Domestic Violence Policy at J.A. Vol. 5, pp. 2211 and 2212 and Deposition Transcript of Joyce Claycomb at J.A. Vol. 5, pp. 2228 and 2229).

The Moundsville Police Department policy in effect in June of 1994 required that protective orders be promptly served. (J.A. Vol. 5, p. 2207). On June 23, 1994, two days after the temporary protective order was issued, Deborah called the Moundsville Police Department and advised that Suarez had taken her car. She wanted to know if the domestic

violence order had been served. (J.A. Vol. 5, p. 2066). It had not. Approximately two (2) hours after this call Suarez called the Moundsville Police Department. (J.A. Vol. 5, p. 2067). At the time of this call, Moundsville had a "caller I.D." system. (J.A. Vol. 5, pp. 2230 and 2231). The system identified the exact location from which the call received by the department was being made as 845-2182, a Moundsville exchange. Despite the fact that Moundsville was aware of Suarez's location, of Deborah's recent call, and of Moundsville's policy, no attempts were made to serve Suarez at that time. (J.A. Vol. 5, pp. 2232 and 2233).

Deborah's mother (Patricia Rodgers) called approximately 10 minutes after Suarez's call. (J.A. Vol. 5, p. 2067). She was advised by Moundsville that "Suarez is aware of [the] D.V. order" and was promised that "if [Suarez] comes around [Deborah's residence] he will be arrested." (J.A. Vol. 5, p. 2067). The next day Deborah called and advised Moundsville that Suarez was "just at her residence". (J.A. Vol. 5, p. 1070). Contrary to the assurances and promises made by Moundsville, no car was dispatched and no arrest was made. Moreover, no attempt was made at that time to even locate Suarez to serve him with the now three (3) day old protective order. However, indicative of the special relationship that had developed between Moundsville and Deborah, she was promised that "she would get an extra patrol for the night." (J.A. Vol. 5, p. 2070).

On June 24, 1994, the final protective order was issued, the terms of which stated that Suarez was to have "no direct contact with [Deborah]". The order also stated that Suarez must have a third party contact Deborah for any visitation to the children, and that he was to refrain from entering Deborah's place of employment, or from contacting, telephoning, communicating or harassing her. (J.A. Vol. 5,

p. 2234). Upon issuance of this order, Magistrate Kerwood called and advised the Moundsville Police Department that he had issued the order and that "[Suarez] can be served and lodged in jail if he violates the order." (J.A. Vol. 5, p. 2076). As of the date of the issuance of the Final Protective Order, the temporary order of 6/21/94 had not been served. The record indicates that the police never served it.

Unfortunately for Deborah, Scott and James, Moundsville's actions with regard to service of the Final Protective Order were as appalling as they had been in regard to the temporary protective order. On June 26, 1994, Deborah called Moundsville and advised that "Suarez was at her residence a little while ago". (J.A. Vol. 5, p. 2083). The Final Protective Order which had been in effect for two days -- and to which the dispatcher had access (J.A. Vol. 5, pp. 2088 and 2089) -- stated unequivocally that Suarez was to have "no direct contact with the petitioner". (J.A. Vol. 5, p. 2234). Deborah told the dispatcher that while she believed "nothing could be done now" . . . she wanted to know "if he comes back and she calls and just gets her name out, will an officer respond." (J.A. Vol. 5, p. 2083). The dispatcher who took this call did in fact consider it to be a domestic call. (J.A. Vol. 5, pp. 2235 and 2236). Despite the fact that the Temporary Protective Order had been outstanding for five (5) days, and the Final Protective order had been outstanding for almost three (3) days, no attempt to serve Suarez was made as a result of this case.

In the five day period since the issuance of the first protective order against him (obtained through Deborah's efforts alone), Moundsville's own records indicate that Suarez had contact with Deborah 3 times. (J.A. Vol. 5, pp. 2066, 2070 and 2083). Not only did Moundsville fail to respond to these contacts by investigating or arresting Suarez -- they

never even acted to serve either of the two protective orders upon being made aware of the contacts. Even if not observed by an officer, the report of a D.V. violation requires an investigation by the police department. (W.Va. Code, §48-2A-10C(b). Thus, Suarez was learning that he could continue to contact Deborah, despite the two (2) orders she obtained -- and receive no response -- not even service of the orders from the Moundsville Police Department. Emboldened by Moundsville's timidity, Suarez boasted that "the cops can't do a damn thing to me . . . they're terrified of me." (J.A. Vol. 5, p. 2238). Thus, the stage was now set forth Suarez to take his violence against Deborah to the next level. Prophetically, this would happen only two (2) hours after the call in which Deborah was eerily assured that Moundsville would respond if she would call and was only able to get her name out.

On June 27, 1994 at approximately 12:36 a.m., Suarez broke into Deborah's house, pointed a loaded and cocked pistol at her head, striking her in the face with it several times. He also threatened to kill her and attempted to rape her. (J.A. Vol. 5, pp. 2084 and 2085 and the criminal complaints relating to the aforesaid issues at J.A. Vol. 5, p. 2239). As a result of the above crimes, Suarez was arrested and ultimately charged with two felonies and one misdemeanor. A bond of $75,000 was set and Suarez remained in jail for approximately three (3) days -- until July 1, 1994, at which time bond was posted. As a condition of his bond, Suarez was

> "Not to violate any law of [WVA], any other state or of the United States" and was to "have no contact whatsoever, direct or indirect, physical or verbal with one Deborah Semple". (J.A. Vol. 5, p. 2242).

In an act which exemplified the inadequacy of their efforts, Suarez was finally served with the outstanding protective order only after he was in custody for the attempted rape and other crimes -- some six days after the temporary order had been issued. (J.A. Vol. 5, p. 2244).

In obvious recognition of the danger Suarez presented to Deborah and those close to her, Moundsville called not only Deborah, but also her mother and father, each on separate occasions, to advise that Suarez had posted bond. (J.A. Vol. 5, p. 2097). Three days after being released from jail, Suarez again tested the waters. He called the Moundsville Police Department from a number identified by the Moundsville called I.D. system as 845-7711 -- a Moundsville exchange. He said "that he had talked with his wife, Debbie . . . about visiting their children". (J.A. Vol. 5, p. 2107). This was an unequivocal violation of both his bond (no contact whatsoever) and of the now served final protective order (no direct contact, all contacts re: visitation through third party), yet no action was taken by Moundsville - not even an attempt to serve him at the location from which he had placed the call. Former Moundsville officer David McCracken, who was on the force at the time said of this call that "this should have been referred to another officer and . . . an effort should have been made to serve . . . [Suarez]." (J.A. Vol. 5, p. 2298). Not surprisingly, the record indicates that Moundsville was called by Deborah's father approximately 15 minutes later advising that Suarez was now harassing him. (J.A. Vol. 5, p. 2107).

On July 6, 1994, Deborah called Moundsville and advised that "Suarez has been harassing her, her babysitter, housekeeping supervisor and father by telephone all day." (J.A. Vol. 5, p. 2116). On July 7, 1994 Deborah's father was painting at her house in Moundsville when Suarez came

to the fence line on the rear of Deborah's property and began shouting and screaming threats at him. Deborah swore out a criminal complaint on July 7, 1994 before Magistrate William Anderson for the aforesaid acts. (J.A. Vol. 5, p. 2245). As a result, a warrant for Suarez's arrest for violating terms of the Final Protective Order was issued by Magistrate Anderson. (J.A. Vol. 5, p. 2246).

Later that same evening at approximately 6:30 p.m., Michael Suarez called the Moundsville Police Department to find out if there was a warrant against him. (J.A. Vol.5, p. 2126). He was advised by Officer Richmond of the warrant. (J.A. Vol. 5, p. 2126). Approximately 15 minutes later, Suarez went to the rear of Deborah's house and began swearing obscenities and directing threats. She immediately called the police and Officer Jeffrey Murray was dispatched. (J.A. Vol. 5, p. 2126).

At the time Murray was dispatched, Moundsville had in its possession a copy of the documentation reflecting the condition of Suarez's bail. (J.A. Vol. 5, pp. 2247 and 2248). Upon his arrival, Murray observed Suarez shouting obscenities at Deborah. (J.A. Vol. 5, pp. 2249 and 2250). However, he only arrested Suarez for the outstanding warrant issued by Anderson. (J.A. Vol. 5, pp. 2251 and 2252). The record before this Honorable Court is devoid of any evidence that Suarez was ever arrested for and/or charged with either (1) the violations of the D.V. order observed by Murray (as separate and distinct from the warrant for which he went to the location to serve) or, (2) the obvious violations of the terms of his bond. Of tragic significance is that at the time Murray observed Suarez in violation of both of his bond and the final D.V. order, West Virginia law provided, in pertinent part, the following:

> "Where a law enforcement officer observes any violation of bail condition, the officers shall, immediately arrest the Defendant and detain the Defendant pending a hearing for revocation of bail." W.Va. Code 62-1C-18(d), a true and correct copy of which is attached at J.A. Vol. 5, p. 2253.

The above language demonstrates that West Virginia law mandated that Michael Suarez be arrested and detained pending a formal revocation hearing.[4] Had this been done, a bond hearing would have taken place and it can be said -- almost without question -- that Michael Suarez's bond would have been revoked and that he would have remained incarcerated until his trial for the attempted rape and other crimes he committed against Deborah.

Suarez was taken before Magistrate Kerwood who had not been provided with copies of Suarez's criminal record, or a copy of the criminal complaint filed as a result of the July 7, 1994 crimes committed by Suarez. The only information Magistrate Kerwood had was the warrant issued by Magistrate Anderson, which, unlike the criminal complaint, did not indicate that Suarez had committed violations of bond. (J.A. Vol. 5, pp. 2245 and 2246). Thus, Kerwood arraigned Suarez only "on the warrant itself". (J.A. Vol. 5, p. 2256).

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[4] West Virginia law also provided that Suarez should have been arrested for Murray's observation of his violation of the D.V. order. (See W.Va. Code §48-2A-10C(A)). Murray also testified that Suarez resisted arrest. There is no record evidence before this Court that he was arrested or charged with that offense.

Significantly, although two Moundsville officers were at Suarez's arraignment before Magistrate Kerwood (J.A. Vol. 5, p. 2258), the record is absent of any evidence indicating that Kerwood was made aware of Suarez's history (while very well known at this point by Moundsville) prior to rendering his decision at the arraignment. Moundsville policy states that the arresting officer "shall advise" the magistrate of an accused's previous history. (J.A. Vol. 5, p. 2224). Consequently, Suarez was released on $500 recognizance bond. (J.A. Vol. 5, p. 2257). At no time prior to the murders was Suarez charged with violating the D.V. order and the terms of his bond as observed by Officer Murray on July 7, 1994.

On July 13, 1994, the Moundsville Police were called by a citizen in Moundsville who positively identified Michael Suarez attempting to break into Deborah's house. She further indicated that he had torn the screen door off the hinges. (J.A. Vol. 5, p. 2137). Officers McCracken and Dunn were dispatched to the residence. However, no statement was obtained from the witness who had called, moreover, no attempt was made to locate or question Suarez. (J.A. Vol. 5, pp. 2302 and 2303). Consequently, no action was taken against Suarez despite the fact that the terms of his bond and D.V. order were still in effect. On July 14, 1994, Deborah called Moundsville to determine if Suarez had been arrested for attempting to break into her house. (J.A. Vol. 5, p. 2139). She was advised that he was not. The record is bereft of any attempt to even talk to Michael Suarez about this incident on behalf of the Moundsville Police Department.

Suarez had again broken the law, thus testing the waters again, several times, since his release from jail on bond. Each time, Moundsville demonstrated to him, in both word and deed, that he could not only come close to the line

-- but cross it with impunity. Theresa Semple testified that Suarez said to her about this time that he was "in absolute triumph over the fact that he knew he could get away with anything he wanted to in Moundsville." (J.A. Vol. 4, pp. 1709 and 1710). Thus, the stage was once again set by Moundsville for the next level of violence by Suarez.

After the July 27, 1994 incident, Deborah had been living, out of fear, with her mother in Wheeling. In furtherance of her resolve to rid herself of Suarez, she planned to move from Moundsville. Deborah had put her house up for sale, and on August 2, 1994, she accepted a $500 down payment for the house from a Wheeling couple. On August 3, 1994, Michael Suarez was riding in a car with an acquaintance, Frank Kimble. They drove past Deborah's house and Suarez saw the "For Sale" sign in her yard. Kimble stated that when Suarez saw the sign, he repeated several times that he "ought to off that fucking bitch." (J.A. Vol. 5, pp. 2260 and 2261). Around this same time, Deborah called Moundsville, and requested that they escort her to her house because she feared Suarez might come around and do harm to her. In evidence once again of their relationship, they agreed, and in fact did escort Deborah to the house so that she could pack some of her belongings. (J.A. Vol. 5, pp. 2284 and 2285). In this regard, Pat Rodgers stated that Deborah articulated her reliance on the police and stated that she "felt safe" when they were around. (J.A. Vol. 5, pp. 2286 and 2287).

On August 6, 1994, Deborah was at her house in Moundsville with Jim Garrison, Scott Semple and her two children. They were all helping Deborah move out. At 1:30 p.m., Deborah called the Moundsville Police Department and advised them that "Mike Suarez has been inside the residence." She advised that there has been paint dumped

down the walls and on the carpets and that she found matches and a can of lighter fluid in the kitchen. She wanted Moundsville to be aware of this in case the house would happen to catch fire. (J.A. Vol. 5, p. 2159). Incredibly, the dispatcher testified that she did not consider this to be a domestic call. (J.A. Vol. 5, p. 2288). Four minutes later, Moundsville received a call again from Deborah's house. Oddly enough, the call came not from Deborah but from her daughter. Deborah got on the phone and advised that her daughter must have hit the redial. Again, nothing was done. (J.A. Vol. 5, p. 2788). Approximately 13 minutes after Deborah's first call on that day, the Moundsville police department received a call from Deborah that "Mike was there". (J.A. Vol. 5, p. 2288). When the police arrived, they found that Suarez had shot and killed Scott Semple, James Garrison and Deborah Semple, and then himself, all in front of Deborah's two children, Angela and Amanda.

The policy of the Moundsville Police Department with regard to domestic violence, as written, is supposed to be proactive in nature, so as to deter and prevent domestic violence from taking place. (J.A. Vol. 5, pp. 2289, 2294, 2295 and 2296). As clearly demonstrated by the above, the policy, in terms of actual practice and custom, was merely reactive, and woefully so, at best. (J.A. Vol. 5, pp. 2295 and 2296). The above record is replete with numerous instances of violations of Moundsville's own written policy.

Not only were the actions of the Moundsville Police Department reactive, but each reaction on their part to Suarez's actions were misguided. Perhaps the statement that best typifies Moundsville's complete lack of understanding of its own written policy was made by Officer Richmond to members of Deborah's family when he said "the only way this could have been avoided was for somebody to kill him."

(J.A. Vol. 5, p. 2297). The absurdity of such a statement being made by a law enforcement official (who presumably knew of the various mandates of both West Virginia law and Moundsville's own policy) is self-evident. It was this diseased mind-set that not only constructed the stage upon which Suarez acted out his violence, but which empowered and encouraged him to act thereon.

While Moundsville's actions caused Suarez to believe he could stalk and harass Deborah with impunity, what did their action cause Deborah to believe? What beliefs had the police planted in Deborah's mind? They had failed to inform her of remedies available to her such as the revocation of Suarez's bond for the many violations of its conditions. They caused her to believe nothing could be done even when they had an eyewitness to the vandalism of her house on July 14, 1994. In effect, the police told Deborah that they could do nothing until she had more proof of the commission of a crime and the person who committed it. Thus, when Deborah called the police on August 6, 1994 to report a possible burglary, she knew the police would request more proof of the crime and the perpetration -- yet she still called. Reporting the crime was not enough, she must also provide proof of the perpetrator. She was well trained by the police. She called to build a record and to get advice. In response the police falsely convinced Deborah that she had no legal remedies at her disposal, then they left her all alone and vulnerable. She died never knowing how the police had deceived her.

ARGUMENT FOR GRANTING WRIT

ARGUMENT 1

The Moundsville Police Department Is Liable Under §1983 Because It Acted In Such A Way As To Enhance The Dander To Deborah Semple. Accordingly, The Fourth Circuit Erred In Holding That The Moundsville Police Department Owed No Duty To Plaintiffs' Decedents, And That The Facts Below Are Not Distinguishable From *DeShaney*.

The Due Process Clause of the Fourteenth Amendment places limitations on affirmative state action that denies life, liberty, or property without due process of law. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195, 109 S.Ct. 998, 103 L. Ed.2d 249 (1989) . In *DeShaney*, this Court stated that the Due Process Clause imposes an affirmative duty to protect an individual against private acts of violence where a "special relationship" exists between the state and the private individual, such as when the state takes a person into its custody. *See id.* at 199-201.

However, this Court left open the possibility that the state may be liable for private acts which violate constitutionally protected rights despite the absence of a special relationship. To-wit: "while the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them." Id.* at 201. (Emphasis added) Several courts of appeals have cited this statement as support for recognizing a constitutional violation under a state-created danger theory of liability. *See Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996); *Uhlrig v. Harder*, 64 F.3d 567, 572 n. 7 (10th Cir. 1995); *Dwares v.*

City of New York, 985 F.2d 94, 99 (2d Cir. 1993); *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir.), *cert. denied*, 510 U.S. 947, 126 L. Ed. 2d 337, 114 S. Ct. 389 (1993); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990).

Liability under the state-created-danger theory is predicated upon acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence. *See D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1374 (3d Cir. 1992) (en banc). As explained by the Seventh Circuit, "if the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982)

Generally, to establish a claim under a theory of "creation of danger," a plaintiff must show that the state actors increased the danger to her, and that the state actors acted with deliberate indifference. *See Piotrowski v. City of Houston*, 51 F.3d 512, 515-16 (5th Cir. 1995). As the Fourth Circuit noted, "where the state has selected an individual from the public at large and placed him in a position of danger, the state was enough of an 'active tortfeasor' to make it only 'just' that the state be charged" with an affirmative duty to defuse this state-created danger. *Jensen v. Conrad*, 747 F.2d 185, 194 (4th Cir. 1984).

In *Kneipp* at 1199, a young woman was walking home with her husband while both were extremely intoxicated. The Defendant police confronted her, separated her from her husband and permitted her to walk home alone. On this walk, she apparently was abducted and tossed into a ditch, suffering severe injuries. The court noted that to establish a claim

under §1983 for "creation of danger" a plaintiff must establish four elements:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Id. at 1208 quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995). The court then held that given the facts before it, the Plaintiffs had sufficiently established all four elements and could withstand a motion for summary judgment.

The "creation of danger" doctrine has been further articulated in the Seventh Circuit. *Reed* at 1122, *cert. denied*, 114 S.Ct. 389 (1993). In this case, the defendant police officer allegedly arrested the driver of a vehicle, leaving the vehicle in the sole control of the passenger, who was highly intoxicated. This intoxicated passenger then drove the vehicle and collided with another vehicle, killing a passenger and her unborn child. Although the original driver was arrested for DUI, the plaintiff (for purposes of the motion before the court) was entitled to a favorable inference that the original driver was sober.

The court held that the defendant police officers had created a dangerous situation to the plaintiffs, thereby creating liability under §1983. *See Id.* at 1127. Prior to the interference of the defendants, the world was faced with the normal danger imposed by a sober driver. However, after the

police arrested this driver, the world was forced to contend with the increased danger posed by an intoxicated driver.

As in *Reed*, so too in the instant case did the conduct of the police department increase the dangers posed by Suarez, who became progressively bolder -- and more dangerous -- in reaction to the police department's conduct. His comment in response to the Defendant's conduct that he felt "in triumph over the fact that he could get away with anything he wanted" (J.A. Vol. 4, pp. 1709 and 1710) alone is evidence of this fact. The police department's conduct made the situation more dangerous in that it continued to embolden Suarez. Thus, as was stated in *Reed*, where police officers "knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse the danger" such officers should be subject to a §1983 claim. *Id.* at 1127; *See also Freeman* at 54-55.

In *Smith v. City of Elyira*, 857 F.Supp. 1203 (N.D.Oh. 1994), the Court denied the plaintiff's summary judgment motion with respect to a substantive due process claim on facts consistent with the facts in the instant case. In *City of Elyira*, the police were faced with numerous complaints from a woman about her ex-husband's threats and physical abuse of her. To-wit:

> Plaintiffs in this case have presented evidence that the police officers either created or increased the danger of Karen Guerrant when (1) Officers Altheide and Charles told Karen, in Alfred's presence, that she would have to initiate eviction proceedings to remove him from the house, (2) they told Karen to call back "if she felt the situation was going to get out of hand," and (3) they told Alfred he

> should throw his clothing back in the house if Karen threw it out. Henderson and Lieutenant Adkins rejected the child Elaine's and Dorice's later pleas for police assistance. This evidence presents a genuine issue of material fact about whether the police affirmatively created the danger to Karen while limiting her ability to help herself and make her more vulnerable to attack, then refused to help her. *Cf. Dwares* at 94; *Freeman* at 55;

Another case that is instructive on this issue is *Sadrud-Din v. City of Chicago*, 883 F.Supp. 270 (N.D.Ill. 1995). In this case, a City police officer habitually abused his spouse. The City was aware of this and even knew that the husband had threatened the plaintiff with a gun on one occasion. When called by the plaintiff, the defendant police force refused to arrest the abusive husband. The husband murdered the plaintiff two days later before killing himself. In denying the Defendant's motion for summary judgment the court noted that the defendant, by refusing to deter the husband once it was aware of his violent acts had increased the danger to the plaintiff. *Id.* at 276.

The case of *Dwares* at 94, further illustrates and explains the "creation of danger" theory. In *Dwares*, the plaintiff participated in a march in favor of the right to burn the flag. While protesting, he was beaten severely by a group of violent "skinheads," who were conducting their own "counter-protest." The defendant police force notified the "skinheads" that the police would permit the "skinheads" to assault the flag-burners so long as such violence did not "get totally out of control." *Id.* at 97. The court found that this sanction of the privately-inflicted injury violated the plaintiff's rights under the Due Process clause. *Id.* at 99. The police

department's prior assurances to the "skinheads" "increased the likelihood that the 'skinheads' would assault demonstrators." *Id.* Like the defendant in *Dwares*, so too did Defendant, through their conduct, give sanction to Suarez, allowing him to believe that he could "... get away with anything he wanted." (J.A. Vol. 4, pp. 1709 and 1710).

The lessons of these cases can be characterized as follows: That where a state actor increases the danger to a plaintiff, liability may be imposed under §1983. Furthermore, the danger may be increased by the ratification or sanctioning of violence done by private third parties. This is precisely what Moundsville did here.

The "creation of danger" in this case is effectively demonstrated by the deposition testimony of Theresa Semple, the widow of Scott Semple. Theresa Semple testified that in July of 1994 -- only a month before the murders -- Suarez called her and made the following disturbing comments:

A: [Suarez] said call the cops. Call the cops all you want. Debbie called the cops. Debbie got this on me. Debbie got that on me. I'm a free man. He said, the cops can't do a damn thing to me. He said, They're terrified of me. You see when they give me orders, when they give me warrants, he said, after I'm already behind bars.

...

But he was just in absolute triumph over the fact that he knew he could get away with anything he wanted to in Moundsville. He said that.

Q: Who said that?

A: He said, You can call the cops. Debbie can call the cops. Call the cops all you want. You see where it gets you guys. You see where it got her. I'm a free man. He said, they won't do anything to me.

(J.A. Vol. 5, p. 2238). These statements are not hearsay because they demonstrate Suarez's state of mind, and the fact that the Defendant's actions caused Suarez to become more violent than he would have been otherwise. These statements indicate precisely how the Defendant's actions made the situation more dangerous for the Plaintiffs. Due to the custom of inept response to Deborah's calls, Suarez believed he could act with impunity.

Furthermore, the conclusions of the Plaintiffs' expert, Dr. Lee Weinberg, also support this theory of "creation of danger." Dr. Weinberg opined that:

> the practices of the Moundsville police department emboldened Michael Suarez to believe that he could continue his abusive behavior toward Deborah without fearing serious interference from the police.... Taken as a whole, the above enumerated practices of the Moundsville police department contributed to increasing the dangers to Deborah and ultimately the loss of her life at the hands of her abusive companion. (J.A. Vol. 5, p. 2295).

The Fourth Circuit and the District Court relied heavily -- if not exclusively[5]-- upon that Court's recent decision in the case of *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir.), *cert. denied*, 116 S.Ct. 530 (1995). However, *Pinder* explicitly recognized the continuing viability of Plaintiff's claims where the state creates or enhances the danger. Moreover, *Pinder* does not state that a plaintiff is required to demonstrate "custody" to maintain a Section 1983 claim. Rather, *Pinder* concerned solely the question of whether a "special relationship" imposing a duty on a state actor may be inferred "solely from an official's awareness of a specific risk or from promises of aid." *Id.* at 1175. The limited holding of *Pinder* was confined to allegations of a duty imposed by a single promise of assurance made to the Plaintiff.[6]

While the police, on one hand, emboldened Suarez to harass Deborah and her family, on the other hand they misinformed Deborah of the remedies the law afforded so that

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[5] It should be noted that the precedential value of Pinder is uncertain. The case was heard *en banc*, with thirteen judges hearing the case. The "majority" only had six strong voices in its favor. The fractional quiltwork of opinions produced in Pinder indicate that the Court did not adopt one binding, uniform approach on the issue.

[6] In must be noted that the Pinder Court was faced with a peculiar issue which renders its opinion of limited application in the present case. The Pinder court was faced with the issue of the "qualified immunity" of an individual officer. Thus, the court was faced with the issue of whether the Defendant violated any right which was "clearly established" at the time of injury to the Plaintiff. Id. The fire in Pinder occurred only days after the Supreme Court's DeShaney holding. Therefore, the Pinder Court reached a very limited decision of whether the Plaintiff's right was "clearly established" in 1989. The Pinder Court did not therefore base its decision upon any of the "creation of danger" cases. Accordingly, any discussion of these cases by the Pinder Court was dicta.

she incorrectly concluded that had no remedies left except to leave town. The police misinformation had reached such extremes that when Deborah, one-half hour before her death, reported a possible burglary at her house the police refused to come and told Deborah she must not only have proof of a crime but proof of the criminal as well. Unfortunately, Deborah believed the police. The system failed her, and she never knew why.

Assuming *arguendo* that *Pinder* should be applied to the present case, the District Court misapprehended the scope of the legal doctrines espoused in *Pinder*. In *Pinder*, the plaintiff's former boyfriend, Don Pittman, broke into her house, physically abused her, and threatened her life. The defendant responded to her call and arrested Pittman. The defendant officer made a single assurance to the plaintiff that Pittman would remain incarcerated for the night. In reliance on this promise, the plaintiff went to work and left her three children at home alone. However, Pittman was released on his own recognizance. He returned to the home and set the house ablaze, killing all three of the plaintiff's children.

This Court in *Pinder* held that the mere promise to keep Pittman incarcerated for the evening would not suffice to create an affirmative duty to protect the plaintiff under §1983. *Id.* at 1174-75.

While the severity and nature of the crimes committed in *Pinder* were no doubt egregious, the facts are clearly distinguishable from the case at hand. First, unlike the *Pinder* plaintiff, the Plaintiffs in the present case do not rely upon a single promise made by the Defendant. Rather, the Plaintiffs have presented evidence of a course of conduct by the Defendant over the summer of 1994 which led to the tragedy of August 6. This conduct included not only promises,

assurances, extra patrols and a police escort, but also a lax attitude towards domestic violence, and other such behavior which demonstrated to Suarez that he could act with impunity. This conduct, toward both Deborah and Suarez enhanced the danger to the Plaintiffs in a multitude of ways. The Defendant's conduct toward Suarez emboldened him, and made him more violent -- while the Defendants' conduct toward Deborah (through extra patrols, assurances, police escorts, etc.) gave her a false sense of reliance and security upon the police. An examination of the effects of these numerous and varied interactions between the police, Suarez and Deborah over the course of the summer of 1994, makes apparent the fact that this case involves much more than the single promise in *Pinder*. To equate the involved and complex relationships between the actors in this case with the single promise made in *Pinder* is to ignore a course of conduct between Moundsville, Deborah and Suarez that was years in the making.

ARGUMENT 2

A Genuine Issue Of Material Fact Exists As To Whether The Moundsville Police Department Had A Defacto Policy Of Ignoring Complaints Of Domestic Violence. Accordingly, The Fourth Circuit Erred In Holding That West Virginia Law Does Not Create A Constitutionally Protected "Property Interest" Which Entitled The Plaintiffs To Due Process

The Defendant was required by West Virginia law to (1) provide Deborah with certain information upon responding to any alleged incident of family violence. *See* W.Va. Code §48-2A-9(b) and (c). Additionally, West Virginia law also required the Defendant to (2) serve Suarez with any domestic violence protective orders in a timely fashion. *See* W.Va.

Code §48-2A-10c(a). The failure of the Defendant to provide such information without a process to govern the deprivation of such services violated the Plaintiffs' Procedural Due Process rights.

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972) the Supreme Court recognized a claim for the violation of procedural due process, for deprivation of a "liberty" or "property" interests. The basis of the Plaintiffs' claims below were that the aforesaid statutes created reasonable entitlement to services, which in essence constituted "property interests." When the Defendant failed to provide these services without offering any procedural protections, it deprived the Plaintiffs of said property interest without Due Process of law.

Procedural Due Process claims involve expectations created by state law. *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791, 794 (11th Cir. 1987), *cert. denied*, 109 S.Ct. 1537 (1989). Generally, to have a "property interest" in a governmental benefit, a person must have "more than an abstract need for it . . . he must have a legitimate claim of entitlement to it." *Mallette v. Arlington County Employee's Retir. Sys. II*, 91 F.3d 630, 634 (4th Cir. 1996) quoting *Roth*, 408 U.S. at 569); *Eldridge v. Bouchard*, 645 F.Supp. 749, 756-57 (W.Va. 1986), *aff'd*, 823 F.2d 546 (4th Cir.). Additionally, in determining whether a statute creates a property interest, the court must look to how much the statute meaningfully limits the discretion of governmental decision makers with regard to the benefit. *Mallette*, 91 F.3d at 634-35.

In the present case, the two challenged statutory provisions create specific entitlements to particular benefits. Upon answering a call of domestic violence, the Defendant

was *required to provide* Deborah with very specific information. Furthermore, once Deborah obtained the protective order, the Defendant was *required* to promptly serve this order. Both of these services provided an expectation of benefit to the Plaintiffs. Furthermore, the Defendant was provided no discretion in the provision of such benefits.

The Fourth Circuit and the District Court held that, even assuming *arguendo* that the statutes create a "property interest", no process is due to the Plaintiffs, because an "adequate post-deprivation remedy" is available in the form of a state tort lawsuit for damages. The rationale is flawed. West Virginia law (particularly as interpreted by the District Court) grants immunity to the defendant and other municipalities from state law tort suits in most circumstances involving a police department's failure to carry out its mandated responsibilities. Thus, the post-deprivation damages remedy is unavailable to most victims.

The lower courts also maintained that because Deborah was given the information required by statute on one occasion, future deprivations of such information were not actionable. As discussed *supra*, the District Court chose to ignore completely the fact that Moundsville failed to provide Deborah with the information on at least one other occasion.

ARGUMENT 3

The Fourth Circuit Erred In Holding That The Record Does Not Create A Genuine Issue Of Material Fact As To The Issue Of The Existence Of A Municipal Policy Or Custom Which Led To Moundsville's Constitutional Violation.

The Plaintiffs agree that to establish municipal liability under §1983, the Plaintiffs must attribute their injuries to a "policy or custom" of the Defendant municipality. The Fourth Circuit held that the Plaintiffs' 42 U.S.C. §1983 claims could not succeed because the evidence did not create a genuine issue of material fact as to the existence of such a policy or custom. However, this conclusion is contrary to the plain evidence presented below.

While the Defendant's formal written domestic violence policy may have been proper, this written policy was not complied with, and the Defendant's actual practice was in direct contradiction to this written policy. Generally, an action which is not taken under a formal written policy may be attributed to the municipality as a "custom" where:

> persistent and widespread practices of municipal officials which although not authorized by written law, are so permanent and well-settled as to have the force of law.

Spell v. McDaniel, 824 F.2d 1380, 1386 (4th Cir. 1987) (*citing Monell v. Department on Soc. Svcs. of the City of New York*, 436 U.S. 658, 691 (1978)); *see also Greensboro Prof. Fire Fighter's Ass'n. v. City of Greensboro*, 64 F.3d 962, 966 (4th Cir. 1995). Such a "custom" can be attributed to the municipality and attach liability where:

> the duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the municipal governing body that the practices have become customary among its employees.... Constructive knowledge may be evidenced by the fact that the practices have become so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known of them.

Spell, 824 F.2d at 1387.

A genuine issue of material fact exists as to whether the actions of the individual officers in the present case may be attributed to the Defendant under the doctrine of "custom," even if such actions are not taken pursuant to a formal written policy of the City of Moundsville. The plaintiffs' expert witness, Lee Weinberg, Ph.D., J.D., examined all of the relevant deposition testimony, including all depositions of the Defendant's officers, agents, and employees. He also examined relevant entries into the Defendant's own police logs related to the Plaintiffs, as well as to domestic violence calls in general and examined the Defendant's formal written policy.

In Dr. Weinberg's opinion, there existed an unconstitutional "policy or custom." In this regard he stated:

> [d]espite the existence of a modern and proper written policy for police procedures for handling domestic violence and protective orders, the Moundsville Police Department over a period of several years has evidenced that its actual practices are significantly

> different. What a police department does constitutes its practices.... The department practice was not to properly train its officers in the implementation of the written policy, but rather to follow customary police practices which minimize and trivialize domestic violence.

(J.A. Vol. 5, pp. 2295 and 2296). This evidence indicates the existence of a genuine issue of material fact as to the existence of a municipal policy or custom.

Therefore, the Fourth Circuit's conclusion as to this issue is in clear error.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this court grant the instant Petition for a Writ of Certiorari and that this matter be heard by the full court.

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Decided October 5, 1999]

No. 97-1708

CHARLES LEE SEMPLE, JR., Administrator of the Estate of Deborah Louise Semple, Deceased; AMANDA LONE SUAREZ, a minor, by Charles Lee Semple, Jr., her grandfather and guardian; ANGELA MARIA SUAREZ, a minor, by Charles Lee Semple, Jr., her grandfather and guardian; THERESA A. SEMPLE, Administratrix of the Estate of Scott A. Semple, Deceased; KERMIT Z. GARRISON, Administrator of the Estate of James K. Garrison, deceased,
Plaintiffs-Appellants,

v.

THE CITY OF MOUNDSVILLE, a Municipal Corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of West Virginia, at Wheeling.
Frederick P. Stamp, Jr., Chief District Judge.
(CA-95-17-5, CA-95-18-5, CA-95-96-5)

Argued: December 1, 1997

Decided: October 5, 1999

Before WIDENER and MURNAGHAN, Circuit Judges,
and PHILLIPS, Senior Circuit Judge.

Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge Murnaghan and Senior Judge Phillips joined.

OPINION

WIDENER, Circuit Judge:

The present appeal arises out of a longstanding domestic dispute between Deborah Semple and Michael Suarez that resulted in a multiple homicide and suicide. Miss Semple was involved in a long-term relationship with Mr. Suarez; they had lived together for years. They had two children, Amanda Lone Suarez and Angela Marie Suarez. The district court entered its judgment in favor of the City on account of the murders of Miss Semple, Scott Semple, and James Garrison, and we affirm.

During the couple's relationship, domestic violence occurred from time to time. On January 15, 1989 Suarez was arrested by the Moundsville Police Department for battery for

an alleged incident of abuse, a misdemeanor, but the charges were dropped at Miss Semple's request. Prior to 1994, Patricia Rodgers, Miss Semple's mother, also contacted the Moundsville Police Department about Suarez's abusive behavior towards Miss Semple and contacted the police multiple times between January and June 1994.

On June 21, 1994, Miss Semple called the Moundsville Police Department from a pay phone and reported that Suarez had abused and threatened her at her Moundsville residence, that Suarez was at the residence with loaded guns, and that their two daughters were also in the house. The police responded, assisted in removing the daughters from the house, advised Miss Semple of her rights as an alleged domestic violence victim and provided her with a copy of the Moundsville Police Department's Victims Information Sheet. During the relevant time period, the Moundsville Police Department had a written Domestic Violence Policy in effect. Also on June 21, 1994, Miss Semple filed a family violence petition, and the West Virginia magistrate issued a family violence temporary protective order directing Suarez to "refrain from contacting, telephoning, communicating, harassing, or verbally abusing [Miss Semple]." After several unsuccessful attempts to serve Suarez with the temporary protective order, he was notified of it, as Deborah's mother was notified, during a telephone conversation on June 23, 1994.

On June 24, 1994, the West Virginia magistrate conducted a final hearing and issued a final order that prohibited Suarez from contacting Miss Semple. The magistrate also contacted the Police Department and advised that "when [Suarez] is seen, he can be served and lodged in

jail if he violates the order." Two days later, Miss Semple called the police and reported that Suarez had been at her house, indicated that she knew nothing could be done at that moment, and asked if an officer would respond if she called and "just got her name out."

Then, on June 27, 1994, the Moundsville Police Department responded to a call from Miss Semple's mother requesting assistance at Miss Semple's residence. The police arrived within three minutes of the phone call and found that Suarez had broken a window, entered the house, struck Miss Semple with a gun, pointed the gun at her head and threatened to kill her. Later that day, Suarez was arrested and charged with felony endangerment with the use of a firearm, felony malicious assault and misdemeanor stalking. Bond was set at $75,000. Further, Suarez was served with the final protective order, and his bond included a provision that he was not to contact Miss Semple.

On July 1, 1994, Suarez posted bond and was released from jail. The Moundsville Police Department attempted to notify Miss Semple. Unable to do so, the police notified Miss Semple's parents of Suarez's release.

On July 6, 1994, Miss Semple called the Moundsville Police Department and reported that Suarez had been harassing her, her father, her babysitter and her housekeeper by telephone. The next day, Miss Semple met with county prosecutors and filed a criminal complaint against Suarez. Based on that complaint, a West Virginia magistrate issued an arrest warrant for the misdemeanor charge of violating the protective order. Later in the day, Miss Semple notified police that Suarez was at the rear door of the Moundsville

residence shouting obscenities at her. The police responded and arrested Suarez. Suarez was released on a $500 personal recognizance bond.

One week later, on July 13, 1994, the Moundsville Police Department responded to an anonymous phone call that reported that Suarez had vandalized the Moundsville residence. The police notified Miss Semple's father of the incident, and he informed the police that Miss Semple no longer lived at that residence.

On August 6, 1994 Miss Semple returned to the Moundsville residence to retrieve some of her possessions. She was accompanied by her two daughters, her brother, Scott Semple, who was armed with a handgun, and James Garrison, a friend of Miss Semple's. At approximately 1:30 in the afternoon, Miss Semple called the police and notified them that Suarez had vandalized the residence, but did not request assistance. Four minutes later, one of Miss Semple's daughters called from the residence. Miss Semple picked up the phone, advised the police that one of the girls was playing with the phone and pressed the redial button, and explained that "everything was fine." Then, at 1:43, Miss Semple made a frantic phone call to inform the police that Suarez was in the house. The police arrived three minutes later to discover that Suarez had shot and killed Miss Semple, Scott Semple, and James Garrison, and then fatally shot himself.

Plaintiffs, Charles Lee Semple, Jr., Administrator of the Estate of Deborah Louise Semple, and Amanda Lone Suarez and Angela Marie Suarez, minors, by Charles Lee Semple, Jr., their grandfather and guardian, filed an action against the City of Moundsville, a municipal corporation, for

damages under 42 U.S.C. § 1983 and under West Virginia's Wrongful Death Statute, W. Va. Code § 55-7-6. On the same day, Theresa A. Semple, Administratrix of the Estate of Scott A. Semple, filed an identical action against the City of Moundsville. Subsequently, Kermit Z. Garrison, Administrator of the Estate of James K. Garrison, filed an identical civil action. The City only, no individual, was sued, and these three actions were consolidated for purposes of trial and discovery.

The City moved for summary judgment, which the district court granted. The court granted summary judgment against the plaintiffs on their § 1983 claims, and also decided the state law claims in favor of the City on the ground that the municipality was immune under West Virginia's state immunity statute. W. Va. Code § 29-12A-5 (a)(5) (1992). Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). We review the district court's grant of summary judgment *de novo,* viewing the evidence in the light most favorable to the non-moving party. *Myers v. Finkle,* 950 F.2d 165, 167 (4th Cir. 1991). As stated, we affirm.

I. *Plaintiffs' 42 U.S.C. § 1983 Claims.*

Section 1983 of Title 42 of the United States Code provides a civil remedy for state deprivations of rights secured by the Constitution and laws of the United States. In *Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 694 (1978), the Supreme Court interpreted § 1983 to permit a municipality to be held liable for constitutional

deprivations resulting from its employees' conduct. Nevertheless, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell,* 436 U.S. at 691. Consequently, this circuit held in *Jordan by Jordan v. Jackson,* 15 F.3d 333, 338 (4th Cir. 1994), that "plaintiffs seeking to impose liability on a municipality must, therefore, adequately plead and prove the existence of an official policy or custom that is fairly attributable to the municipality and that proximately caused the deprivation of their rights." See also *Monell,* 436 U.S. at 694 (holding plaintiff must prove that "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury"); *Spell v. McDaniel,* 824 F.2d 1380, 1386-87 (4th Cir. 1987), *cert. denied sub nom., City of Fayetteville, N.C. v. Spell,* 484 U.S. 1027 (1988). Thus, a prerequisite to municipal liability is the finding that an official policy or custom existed.

An official policy often refers to "formal rules or understandings ... that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time," *Pembaur v. Cincinnati,* 475 U.S. 469, 480 (1986), and must be contrasted with "episodic exercises of discretion in the operational details of government." *Spell,* 824 F.2d at 1386. In addition, the governmental unit may create an official policy by making a single decision regarding a course of action in response to particular circumstances. *Pembaur,* 475 U.S. at 481. These principles are limited, however, because municipal liability attaches only when the decision maker is the municipality's governing body, a municipal agency, or an official possessing

final authority to create official policy. *Pembaur,* 475 U.S. at 481; *Spell,* 824 F.2d at 1387.

In the case before us, the City had a written domestic violence policy. The plaintiffs make no claim that the existence of the policy, or any part of it, was the cause of their injury. Therefore, there is no claim because of the existence of the policy.

Along the same line, the district court correctly held that the plaintiffs had not presented any facts which arguably showed that the City had a written or spoken plan of action that directed the officers to respond to Miss Semple's request for assistance in any unlawful manner and that no evidence tended to show that the individual officers did anything but exercise their own discretion in applying the various statutes, regulations and policies governing the treatment of domestic violence situations.

In a like argument, the district court related that undisputed facts contained examples of police inaction: the police did not serve a temporary protective order as soon as the plaintiffs say they should have; they did not advise Miss Semple on every separate occasion of her victim's rights; and they did not physically respond to some of Miss Semple's contacts about Suarez's behavior. To these we add the present complaint that the police did not seek a revocation of Suarez's bail when they either saw him talking to Miss Semple or heard that he had spoken to her following the issuance of the criminal warrant by the magistrate on July 7th. None of these acts, although they may be negligent, were shown to be performed in any manner approaching intentional conduct or conduct so reckless that intent might be inferred from it.

Especially the complaint that the police did not seek revocation of Suarez's bail following a conference between Miss Semple, the magistrate and the prosecuting attorney, seems to be stretching too far when we consider that the complaint at that time mentioned a violation of bail and the magistrate took no action in that respect, even with the prosecuting attorney present. We doubt that the officers should have proceeded on a course not recommended by the prosecuting attorney, even though they may have seen or heard that Suarez had contact with Miss Semple, when they served the criminal warrant just issued by the magistrate; and even if they did, their conduct amounts to no more than negligence. "[T]he due process clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams,* 474 U.S. 327, 328 (1986).

Plaintiffs contend that the existence of a municipal custom may be inferred from the City of Moundsville's course of action regarding Miss Semple during 1994 and from the testimony of members of the Moundsville Police Department and plaintiffs' expert. The plaintiffs' expert witness, after reviewing the police log with regard to the plaintiffs' and domestic violence calls generally, opined that the police department's actual practices were different from the municipality's written policy. He concluded that "[t]he department practice was not to properly train its officers in the implementation of the written policy, but rather to follow customary police practices which minimize and trivialize domestic violence." Thus, within that analysis, plaintiffs allege deficiencies in police training. In order for a municipality to be liable pursuant to § 1983 under a theory of deficient training, those deficiencies in police training policies

that result from policy-maker fault must rise to at least the degree of deliberate indifference to or reckless disregard for the constitutional rights of persons within police force jurisdiction. *Spell,* 824 F.2d at 1390; *Jordan,* 15 F.3d at 341. "Only if, in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights," can a municipality reasonably 'be said to have been deliberately indifferent to that need.'" *Jordan,* 15 F.3d at 341 (quoting *City of Canton v. Harris,* 489 U.S. 378, 388 (1989)). Therefore, a plaintiff must point to a specific deficiency and not a general ineffectiveness of the training. *Spell,* 824 F.2d at 1390. The deficiency also must make the occurrence of the specific violation a "reasonable probability rather than a mere possibility" when the exigencies of police work are considered. *Spell,* 824 F.2d at 1390. Thus, a plaintiff must establish a direct causal connection between specific deficiencies and a specific injury. *McWilliams v. Fairfax County Bd. of Supervisors,* 72 F.3d 1191, 1198 (4th Cir. 1996). Finally, proof of a single incident of the unconstitutional activity charged is not sufficient to prove the existence of a municipal custom. *Spell,* 824 F.2d at 1387-88. See *City of Oklahoma City v. Tuttle,* 471 US. 808, 823-24 (1985) (plurality opinion).

Although plaintiffs allege that the Moundsville Police Department's practice was to train officers improperly in the implementation of the official domestic violence policy, they do not point to any specific deficiency in police training. When taking all the evidence in the light most favorable to the plaintiffs, the most they could prove is that there may have

been a general ineffectiveness in training.[1] The plaintiffs present no evidence of a specific deficiency, and therefore their § 1983 claim fails in this respect.

II. *Plaintiffs' state law claims.*

We next consider the plaintiffs' state law claims. A district court may exercise its discretion in retaining jurisdiction over state law claims made in the case through supplemental jurisdiction pursuant to 28 U.S.C. § 1367 when there is a federal basis for jurisdiction. See *Shanaghan v. Cahill,* 58 F.3d 106, 109 (4th Cir. 1995). The district court exercises its discretion by considering factors that include: "convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy." See *Shanaghan,* 58 F.3d at 110. In light of these factors, we are of opinion that the district court did not abuse its discretion by retaining jurisdiction over the pendent state law claims.

The West Virginia Code provides that municipalities are "immune from liability . . . [that] results from . . . the failure to provide, or the method of providing, police [or] law enforcement . . . protection." W. Va. Code § 29-12A-5(a)(5). An exception to such immunity exists under West Virginia law, and to benefit from this exception a plaintiff must demonstrate that a special relationship existed between the police and the plaintiff. *Randall v. City of Fairmont Police Dept.,* 412 S.E.2d 737,748 (W. Va. 1991); *Wolfe v. City of*

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[1] We do not address whether there actually was a general ineffectiveness of training.

Wheeling, 387 S.E.2d 307 (W. Va. 1989). To establish a special relationship, the plaintiff must show:

> (1) an assumption by the local government entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

Wolfe, 387 S.E.2d at 311 (citations omitted).

The district court properly granted the defendant's motion for summary judgment as to the state law claims. It correctly held that the West Virginia immunity statute applied to the City of Moundsville and that the plaintiffs failed to establish a genuine issue of material fact that they fell within the special relationship exception. As to plaintiffs Semple and Garrison, there is no evidence of direct contact between themselves and the police. In addition, there is no evidence of an assumption by the City of Moundsville of an affirmative duty to act on behalf of Miss Semple, Semple or Garrison. Because West Virginia's immunity statute applied and plaintiffs were unable to raise a genuine issue of material fact regarding the applicability of the special relationship doctrine,

the defendant was entitled to judgment as a matter of law on the state claims, and summary judgment was appropriate.[2]

III.

In summary, we should add that the brief of the appellant-plaintiffs in this case consists of four main parts divided into 15 sub-parts. We have discussed each assignment of error we feel ought to be discussed, and are of opinion there is no reversible error in the points raised which are not specifically mentioned, for the reasons expressed by the district court in its opinion.

The judgment of the district court is accordingly

AFFIRMED.

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[2] While there may be some doubt as to whether or not an appeal was taken by the estates of Amanda and Angela as to this point, we will consider the same as done and decide that the decision of the district court is correct, that there have been cited no specific facts which would create a general issue of material fact that either Amanda or Angela justifiably relied on the police for protection.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

[Filed April 28, 1997]

Nos. 5:95CV17, 5:95CV18 & 5:95CV96

CHARLES LEE SEMPLE, JR., Administrator of the Estate of Deborah Louise Semple, deceased, AMANDA LONE SUAREZ, a minor, by Charles Lee Semple, Jr., her grandfather and guardian and ANGELA MARIE SUAREZ., a minor, by Charles Lee Semple, Jr., her grandfather and guardian,	)
Plaintiffs,	)
v.	)
CITY OF MOUNDSVILLE, a municipal corporation,	)
Defendant,	)
and	)

THERESA A. SEMPLE,
Administratrix of the Estate of
Scott A. Semple, Deceased,
Plaintiff,

v.

CITY OF MOUNDSVILLE, a
municipal corporation,
Defendant,

and

KERMIT Z. GARRISON,
Administrator of the Estate of
James K. Garrison, deceased,
Plaintiff,

v.

THE CITY OF MOUNDSVILLE,
a municipal corporation,
Defendant,

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

These three consolidated civil actions arise out of the tragic multiple homicides and suicide following a longstanding

domestic dispute between Deborah Semple and Michael Suarez. On August 6, 1994, Michael Suarez shot and killed Deborah Semple, James K. Garrison and Scott A. Semple in the presence of Amanda Suarez and Angela Suarez, the daughters of Deborah Semple and Michael Suarez. Suarez then shot and killed himself. The personal representatives of the Semple and Garrison estates and Amanda and Angela Suarez, by their guardians, filed these suits against the City of Moundsville to recover for the alleged wrongful deaths of their decedents. By these suits, plaintiffs claim that the City of Moundsville, West Virginia, through its police department, violated the decedents' federal civil rights and violated certain state laws. Following discovery, the City filed a motion for summary judgment. For the reasons set forth in detail below, this Court finds that the defendant's motion for summary judgment should be granted.

II. Procedural History

On February 17, 1995, plaintiffs Charles Lee Semple, Jr., Administrator of the Estate of Deborah Louise Semple, deceased, Amanda Lone Suarez, a minor by Charles Lee Semple, Jr., her grandfather and guardian, and Angela Marie Suarez, a minor by Charles Lee Semple, Jr., her grandfather and guardian, filed Civil Action No. 5:95CV17 against defendant, City of Moundsville, a municipal corporation, seeking damages under 42 U.S.C. § 1983 and under West Virginia's Wrongful Death Statute, W. Va. Code § 55-7-6. On that same date, Theresa A. Semple, Administratrix of the Estate of Scott A. Semple, deceased, filed an identical action against the City of Moundsville (Civil Action No. 5:95CV18). On May 25, 1995, plaintiffs in Civil Action No 5:95CV17 filed an amended complaint. Subsequently, on May 30, 1995,

plaintiff in Civil Action 5:95CV18 filed an identical amended complaint. Further, on July 15, 1995, Kermit Z. Garrison, Administrator of the Estate of James K. Garrison, deceased, filed a civil Action identical to Civil Action Nos. 5:95CV17 and 5:95CV18 (Civil Action No. 5:95CV96). After dismissing plaintiffs' punitive damages claims in Civil Action Nos. 5:95CV17, 5:95CV18 and 5:95CV96 and denying defendant's motion to dismiss the amended complaint in Civil Action Nos. 5:95CV17 and 5:95CV18, this Court consolidated Civil Action Nos. 5:95CV17, 5:95CV18 and 5:95CV96 for purposes of discovery and trial.

On February 4, 1997, defendant City of Moundsville filed a motion for summary judgment. On February 14, 1997, plaintiffs[3] filed a response to the motion. On February 21, 1997, the City of Moundsville filed a reply to its motion for summary judgment. Finally, on February 28, 1997, plaintiffs filed a surreply[4] to the defendant's motion for summary judgment.

III. Statement of Undisputed Material Facts[5]

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[3] Hereinafter, "plaintiffs" refers to all plaintiffs in Civil Action Nos. 5:95CV17, 5:95CV18 and 5:195CV96.

[4] Plaintiffs filed a motion for leave to file a surreply. This Court GRANTS plaintiffs' motion for leave to file a surreply and the surreply is DEEMED FILED.

[5] During the pre-trial conference held in this matter on March 17, 1997, plaintiffs' counsel represented to this Court that plaintiffs' investigation into the facts of this case was ongoing and that plaintiffs could not indicate exactly what witnesses would be

This Court finds that the following material facts[6] are

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testifying nor could they indicate the content of some witnesses' testimony. Defendant's counsel objected to allowing plaintiffs to add any new witnesses based upon a continuing investigation because the time for discovery had ended and because the defendant had no knowledge of new witnesses and had been afforded no opportunity to depose such witnesses. Further, plaintiffs' counsel represented that he had recently received new information, through the records of Amanda Suarez' psychologist, regarding what Amanda saw on the day of the shootings. Plaintiffs' counsel indicated that he was continuing to discover information concerning the matter, that he did not want to go to trial before exploring the impact of this information on the case and that he was willing to have the case continued in order to pursue the information.

With regard to both the continuing investigation and the new information, this Court finds that both were improper because discovery closed in this matter on December 31, 1996. Thus, absent a good reason for permitting the introduction of evidence disclosed beyond the discovery period, the evidence should not be considered. Plaintiffs have shown, no good reason for this Court to permit plaintiffs to introduce as evidence information discovered from an ongoing investigation. This matter has been pending since 1995 and plaintiffs have had sufficient time to conduct an investigation. Further, with regard to the newly discovered evidence from the psychologist's records, this Court finds that the production of such records was in plaintiffs' control and that this late disclosure is not excusable. Accordingly, to the extent that plaintiffs wished this Court to consider any of the foregoing in relation to the motion for summary judgment, this Court finds that considering such evidence would be inappropriate.

[6] This Court notes that the vast majority of the exhibits submitted by the parties in support of and in opposition to the

relevant to the issues presented by the defendant's motion for summary judgment:

1. Deborah Louise Semple ("Deborah") was involved in a long-term relationship with Michael A. Suarez ("Michael"),

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motion for summary judgment do not comply with the requirements of Fed. R. Civ. P. 56. Fed. R. Civ. P. 56 requires that "affidavits used for summary judgment purposes . . . set forth admissible evidence. . ." Rule 56(e) further requires the party to attach "'sworn or certified copies to all documents referred to in the affidavit.'" Orchard Group, Inc.v. Konica Medical Corp., 918 F. Supp. 186, 190 (E.D. Ohio 1996). "In order for a document to be considered in support of or in opposition to a motion for summary judgment, it must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." Burnett v. Stagner Hotel. Courts, Inc., 821 F. Supp. 678, 683 (N.D. Ga. 1993), aff'd, 42 F.3d 645 (11th Cir. 1994). However, uncertified or otherwise inadmissible documents may be considered by the court in ruling on a motion for summary judgment if the documents are not challenged. Id. at n.2; see also Jones v. Owens-Corning Fiberglass Corp, and Achem Products, Inc., 69 F.3d 712 (4th Cir. 1995). Except to the extent that defendant has objected to certain evidence presented by plaintiffs on hearsay grounds, neither party has objected to the consideration of the evidence on the grounds that the evidence does not comply with the requirements of Fed. R. Civ. P. 56. Thus, although most of the evidence submitted by the parties in support of and in opposition to the motion for summary judgment is not properly attested and/or authenticated, this Court will consider the evidence, except for the hearsay evidence to which defendants have objected, in deciding the summary judgment motion.

2. Two children were born to the couple: Amanda Lone Suarez ("Amanda") and Angela Marie Suarez ("Angela").

3. Scott A. Semple ("Scott") was Deborah's brother.

4 James K. Garrison ("Garrison") was a friend of Deborah's.

5. Defendant City of Moundsville ("the City") is a municipal corporation.

6. Domestic violence was present in Deborah and Michael's relationship.

7. On January 15, 1989, Deborah called the Moundsville Police Department and filed a misdemeanor battery charge against Michael for an alleged incident of abuse. Michael was arrested and was released on bond the day of the arrest. Ten days later, Deborah sighed a form requesting that the battery charge be withdrawn, and Marshall County Magistrate Mark A. Kerwood dismissed the battery charge against Michael.

8. Patricia Rodgers, Deborah's mother, testified in her deposition that prior to 1994 she contacted the Moundsville Police Department about Michael's violent behavior towards Deborah. Rodgers further testified that from January to June 1994, she contacted the Moundsville

Police Department regarding Michael's abusive behavior toward Deborah on approximately six occasions.[7]

9. On June 21, 1994, Deborah called the Moundsville Police Department from a pay telephone to report that Michael had abused and threatened her at her 22 Oak Avenue residence, that Michael had loaded guns at the residence and that Amanda and Angela were still at the residence. Moundsville police officers responded to the call and assisted Deborah in removing Amanda and Angela from the home. The officers advised Deborah of her rights as an alleged victim of domestic violence and provided her with a copy of the Moundsville Police Department's Victims Information Sheet.

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[7] Rodgers further testified that from 1989 to 1994 Deborah and other members of her family contacted the Moundsville Police Department about Michael. Defendant challenges these statements by Patricia Rodgers as inadmissible hearsay that cannot be considered by the Court when deciding the motion for summary judgment. This Court agrees that Ms. Rodgers' statements concerning the number of times Deborah and other family members called the Moundsville Police Department during the years fo 1987 through 1994 are hearsay statements. Rodgers further stated in her deposition that Deborah told her that on one occasion she requested that the Moundsville Police Department escort her to her home to pick up some belongings and that police officers had met Deborah at her home for that purpose and that she felt safe when accompanied by the police. Defendant challenges these statements as inadmissible hearsay and this Court Agrees. Therefore, Ms. Rodgers' statements regarding certain contacts with the Moundsville Police Department and Deborah's request for a police escort will not be considered in resolving the summary judgment motion.

10. On June 21, 1994, Deborah filed a Family Violence Petition at the Marshall County Magistrate's Office. Magistrate Mark Kerwood issued a Family Violence Temporary Protective Order directing Michael to "refrain from contacting, telephoning, communicating, harassing, or verbally abusing [Deborah] . . ."[8]

11. Moundsville Police Department policy stated that the police would promptly serve protective orders.

12. Several unsuccessful attempts were made to serve Michael with the Temporary Protective Order. On June 23, 1994, Deborah phoned the Moundsville Police Department and advised that Michael had taken her car. Deborah further indicated that she did not want to file a complaint about the car. Approximately two hours later, Michael called the Moundsville Police Department and was advised of the Family Violence Protective Order. Although the Moundsville Police Department was aware of the location of the phone call, no attempt was made to serve Michael with the protective order at that location.

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[8] Plaintiffs assert that the protective order also prohibited Michael from contacting Deborah's "mother and family." However, after reviewing the Family Violence Temporary Protective Order (Plaintiff's Exhibit U, incomplete, and Defendant's Exhibit E), this court cannot find any reference to Deborah's mother or family in the order. This Court finds that plaintiffs may be referring to Deborah's Family Violence Petition filed on June 21, 1994 in which Deborah requests that the protective order require that Michael stay away from her "mother and family." The actual Family Violence Temporary Protective Order, however, does not grant that relief.

13. On June 23, 1994, Deborah's mother called the police department and was advised that Michael was aware of the protective order and would be arrested if he came to Deborah's residence.

14. On June 24, 1994, Deborah called the Moundsville Police Department and advised the Michael had been at her residence. The police promised that Deborah would get an extra patrol for the night.

15. On June 24, 1994, Magistrate Kerwood conducted a final hearing on the domestic violence complaint and ordered that Michael was prohibited from contacting Deborah. Magistrate Kerwood contacted the Moundsville Police Department and advised that "when [Michael] is seen, he can be served and lodged in jail if he violates the order."

16. On June 26, 1997, Deborah called the Moundsville Police Department and reported that Michael had been at her house earlier that day. She indicated that she knew "nothing could be done now," but asked if an officer would respond if Michael returned and she "just got her name out."

17. On June 27, 1994, the Moundsville Police Department responded to a call from Deborah's mother requesting that the police go to 22 Oak Avenue, Deborah's residence. Within three minutes of the phone call, the police officers arrived at the home to find that Michael had broken a window, entered the residence, pointed a gun at Deborah's head, struck her with the gun, attempted to choke her and threatened to kill her.

18. On June 27, 1994, the police arrested Michael and charged him with felony wanton endangerment with the use of a firearm, felony malicious assault, and misdemeanor stalking.

19. On June 27, 1994, Michael was arraigned before Marshall County Magistrate William Anderson who set Michael's bond at $75,000.00. Michael's bond contained a provision that he was to have no contact with Deborah.

20. On June 27, 1994, Michael was served with the final protective order.

21. After the June 27, 1994 incident, Deborah moved to her mother's home in nearby Wheeling, West Virginia.

22. On July 1, 1994, a surety bond was posted on Michael's behalf and he was released from jail.

23. On July 1, 1994, the Moundsville Police Department attempted to notify Deborah that Michael had been released from jail. After failing to reach Deborah, the Police Department notified Deborah's mother and father of Michael's release.

24. On July 6, 1994, Deborah phoned the Moundsville Police Department and reported that Michael had been telephonically harassing her, her father, her babysitter and her housekeeping supervisor. Arrangements were made at that time for Deborah to contact Magistrate Kerwood to report these violations.

25. On July 7, 1994, Deborah met with employees of the Marshall County Assistant Prosecuting Attorney's Office.

26. On July 7, 1994, Deborah filed a criminal complaint against Michael. Based upon that complaint, Marshall County Magistrate David Buzzard issued a warrant for Michael's arrest for the misdemeanor charge of violation of the final protective order.

27. On July 7, 1994, Deborah called the Moundsville Police Department and stated that Michael was at the rear of Deborah's house and was shouting obscenities at her.

28. Only July 7, 1994, a Moundsville police officer arrived at the scene and arrested Michael. Michael was brought before Magistrate Kerwood who released him on a $500.00 personal recognizance bond.

29. On July 13, 1994, an anonymous caller indicated that Michael had vandalized a screen door at 22 Oak Avenue. The Moundsville Police Department responded to the residence and notified Deborah's father of the incident. Deborah's father advised the police that Deborah was no longer living at the 22 Oak Avenue residence. On that same date, Deborah called the Moundsville Police Department to inquire whether Michael had been arrested. The Police Department told her that he had not been arrested.

30. During the time period between June 1994 and August 1994, the Moundsville Police Department had no

contact, direct or indirect, with Scott or James concerning Deborah's problems with Michael.

31. On August 6, 1994, Deborah arrived at 22 Oak Avenue with Amanda, Angela, Scott, and James. Scott was armed with a loaded handgun. At approximately 1:30 p.m. on that date, the police received a telephone call from Deborah reporting that Michael had vandalized the 22 Oak Avenue residence. At that time, Deborah did not request police assistance. Four minutes later, a young girl called the home. Deborah picked up the phone and advised the dispatcher that one of the girls was playing with the phone and had hit the redial button. Again, Deborah advised that "everything was fine." Finally, at 1:43 p.m., Deborah made a frantic call advising that Michael was in the house. Three minutes later, at 1:46 p.m., Moundsville Police Officers arrived at the scene to discover that Michael had shot and killed Deborah, James and Scott and then shot and killed himself.

32. The Moundsville Police Department has a written Domestic Violence Policy which was in effect on August 6, 1994.

33. In his report, plaintiffs' expert Dr. Lee Weinberg, stated that the Moundsville Police Department Domestic Violence Policy was "a modern and proper written policy for police procedures for handling domestic violence and protective orders."

IV. Summary Judgment Standards

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." Id. The party seeking summary judgment bears the initial burden of showing the absence of any issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). However, as the United States Supreme Court noted in Anderson v. Liberty Lobby, Inc., Rule 56(c) itself provides that "a party opposing a properly supported motion for summary judgment 'may not rest upon mere allegations or denials of [the] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" 477 U.S. 242, 256 (1986). "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. See also Charbonnage De France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979) (Summary judgment "should be granted only in those cases where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." (citing Stevens v. Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950)).

In Celotex, the Court stated that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Summary judgment is not appropriate until after the non-moving party has had sufficient opportunity for discovery. Oksanen v. Page Memorial Hosp., 912 F.2d 73, 78 (4th Cir. 1990). In reviewing the supported underlying facts, all inferences must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

V. Discussion

1. Introduction

In their respective complaints, plaintiffs allege four counts against the City of Moundsville. First, plaintiffs allege that the City of Moundsville violated the substantive due process rights of Deborah, Amanda, Angela, Scott and James under the Fourteenth Amendment of the United States Constitution by failing to adequately protect them from Michael's violent behavior. Second, plaintiffs allege that the City violated the procedural due process rights of Deborah, Amanda, Angela, Scott and James by failing to advise Deborah of her statutory rights pursuant to West Virginia statute regarding remedies available to victims of domestic abuse and by failing to timely serve Michael with the Family Violence Temporary Protective Order in derogation of a statutory directive. Third, the plaintiffs allege that the City is liable for a violation of Deborah, Amanda, Angela, Scott and James' right to equal protection under the Fourteenth Amendment because the police department discriminated against them based upon Deborah's status as a woman and

upon Deborah, Amanda, Angela, Scott and James' status as victims of domestic violence. Finally, the plaintiffs allege that the City is liable under West Virginia law for negligently and/or intentionally failing to protect, Deborah, Angela, Amanda, Scott and James from Michael.

As discussed below, this Court finds that all of plaintiffs' claims must fail. First, plaintiffs cannot survive summary judgment on their claims of substantive due process violations. Plaintiffs argue that a "special relationship" giving rise to substantive due process rights as contemplated by the United States Supreme Court in DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189 (1989), existed between the Moundsville Police Department and Deborah, Amanda, Angela, Scott and James. However, this claim is fundamentally without merit because they are not in the custody of the Moundsville Police Department as required by Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995), cert. denied, 116 S.Ct. 530 (1995), such that a "special relationship" existed. Further, plaintiffs have failed to show that the police created or enhanced the danger faced by Deborah, Amanda, Angela, Scott and James in relation to Michael. Finally, even if plaintiffs could show that certain police officers increased the danger to Deborah, Angela, Amanda, Scott and James, the plaintiffs have presented no evidence to create a genuine issue of material fact that the actions taken by police to increase the danger resulted from a City of Moundsville custom or policy.

This Court finds that plaintiffs' claim of a procedural due process violation must fail for six separate reasons. First, the West Virginia statutes cited by plaintiffs as the basis for the procedural due process claim do no give rise to a liberty

or property interest that is protected by the Fourteenth Amendment. Second, this Court finds that even if Deborah had a property interest arising from the statutes that required police to advise domestic violence victims of available assistance, Deborah was in fact advised of those rights upon at least one occasion. Third, this Court finds that even if Deborah was entitled to procedural due process protections under the statutes, the statutes did not apply to James or Scott. Fourth, plaintiffs have failed to show that the Family Violence Temporary Protective Order vested in Deborah any cognizable property interest in having the order served upon Michael and receiving police protection. Fifth, the plaintiffs have failed to establish that Amanda, Angela, Scott or James had a cognizable property interest in the service of an protection under the protective order. Finally, plaintiffs have failed to show that any failure to advise Deborah, Amanda, Angela, Scott and James of available assistance and to serve the protective order was a result of a municipal custom or policy.

This Court finds that plaintiffs' equal protection claims fail as well. Plaintiffs have failed to produce any evidence that the Moundsville Police Department was motivated by a discriminatory intent in allegedly failing to provide the same protection to Deborah, Amanda, Angela, Scott and James as it did for other victims of assault. Further, even if plaintiffs could properly allege an equal protection claim, plaintiffs have not shown that the violation was the result of a City custom or policy.

Finally, this Court finds that plaintiffs' state law claims cannot survive defendant's motion for summary judgment. Defendant City is statutorily immune from suit for

its alleged failure to protect or to have an adequate method for protecting Deborah, Amanda, Angela, Scott or James justifiably relied on any alleged promises or assurances made by police regarding police protection. Therefore, plaintiffs have not shown the existence of a "special relationship" that would cause the City to lose its immunity protection under the statute. Finally, even assuming plaintiffs have set forth a viable state law claim, this Court finds that the state law claims could be dismissed without prejudice pursuant to 28 U.S.C. § 1367.

2. 42 U.S.C. § 1983 Claims for Civil Rights Violations

a. Municipal Liability Under 28 U.S.C. § 1983

In this case, plaintiffs seek recovery only from the City of Moundsville, a municipal corporation. In suits against municipalities for civil rights violations, plaintiffs must prove both that a civil rights violation occurred and that the violation can properly be imputed to the municipality. Accordingly, in evaluating the defendant's motion for summary judgment, not only must this Court must consider the viability of plaintiffs' § 1983 claims on their own merits, this Court must also consider whether the plaintiffs have met the requirements for imposing liability for civil rights violations upon a municipality.

A municipality cannot be liable for the unconstitutional acts of its employees under a theory of respondeat superior. Rather, "municipal liability [for civil rights violations] results only 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the

injury.'" Spell v. McDaniel, 824 F.2d 1380, 1385 (4th Cir. 1984), cert. denied sub nom., 484 U.S. 1027 (1988), citing Monell v. Department of Social Serv., 436 U.S. 658, 694 (1978); see also Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993) ("In order to hold a municipality liable under § 1983 for the conduct of employees below the policy making level, a plaintiff 'must show that the violation of his constitutional rights resulted from municipal custom or policy.'" (citations omitted)). Further, the Fourth Circuit has noted that fault for a constitutional violation can be assigned to a municipality only when a policy or custom is "(1) fairly attributable to the municipality as its 'own,'. . . and is (2) the 'moving force' behind the particular constitutional violation." Spell, 824 F.2d at 1387 (citations omitted).

The Fourth Circuit in Spell defined "policy" as a "'course of action consciously chosen from various alternatives' respecting basic governmental functions, as opposed to episodic exercises of discretion in the operational details of government." Id. at 1386 (citations omitted). The Spell court described "custom" as "'persistent and widespread . . . practices of [municipal] officials [which] [a]lthough not authorized by written law, [are] so permanent and well-settled as to [have] the force of law.'" Id. (citations omitted). Further, the Fourth Circuit noted that

> [where] a municipal "policy or custom" is itself unconstitutional, the causal connection between the policy and violation is manifest and does not require independent proof. . . . But, a policy or custom that is not itself unconstitutional in this strict sense must be independently proven to have caused the

> violation. Proof merely that such a policy or custom was "likely" to cause a particular violation is not sufficient; there must be proven at least an "affirmative link" between the policy or custom and violation. . . .

Id.,at 1388.

b. Substantive Due Process Claims Under 42 U.S. § 1983

In Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1994), cert. denied, 116 S. Ct. 530 (1995) ("Pinder II"), the Fourth Circuit Court of Appeals, sitting en banc, recently clarified its position on "failure to act" substantive due process claims under 42 U.S.C. § 1983. In Pinder II, Carol Pinder's former boyfriend, Don Pittman, broke into her home, abused her, and threatened her. Responding to a call, Officer Johnson arrived at Pinder's home and placed Pittman under arrest. Pinder asked Officer Johnson if it would be safe to return to work and leave her children at home. Officer Johnson assured Pinder that Pittman would-be in jail at least until the next morning. Based on this assurance, Pinder returned to work. Later than same evening, Pittman was released from custody on his on recognizance. Pittman then returned to Pinder's home and set her house on fire, killing Pinder's three children. Id. at 1171-72. Pinder sued the City and Officer Johnson under 42 U.S.C. § 1983, alleging that the defendants had violated their affirmative duty to protect her and her children from Pittman, thereby depriving them of their constitutional right to due process under the Fourteenth Amendment.

Reversing its opinion in Pender v. Johnson, 33 F.3d 368 (4th Cir. 1994), rev'd, 54 F.3d 1169 (4th Cir. 1995), cert. denied, 116 S. Ct. 530 (1995) "(Pinder II"), the Fourth Circuit held that "the Due Process Clause of the Fourteenth Amendment does not require governmental actors to affirmatively protect life, liberty or property against intrusion by private third parties." 54 F.3d at 1174, citing DeShanev v. Winnebago County Dept. of Soc Serv., 489 U.S. 189 (1989); see also Dudosh v. City of Allentown, 665 F. Supp. 381, 388 (E.D. Pa. 1987) on reconsideration, 722 F. Supp. 1233 (E.D. Pa. 1989) ("[T]he [due process clause] does not impose upon the states an obligation to provide their citizens with . . . adequate police protection."). Noting that the Supreme Court rejected an affirmative duty of protection theory in DeShaney, the court indicated that "an affirmative duty to protect may arise when the state restrains persons from acting on their own behalf," 54 F.3d at 1174. However, the court held that "[s]ome sort of confinement of the injured party -- incarceration, institutionalization, or the like -- is needed to trigger the affirmative duty. This Court has consistently read DeShaney to require a custodial context before an affirmative duty can arise under the Due Process Clause." Id. at 1175.

In addition to making custody a prerequisite to the affirmative duty to protect under 42 U.S.C. § 1983, Pinder II expressly rejected the theory that a "special relationship" giving rise to an affirmative duty to protect can be created by "explicit promises." The court stated that "[b]y requiring a custodial context as the condition for an affirmative duty, DeShaney rejected the idea that such a duty can arise solely from an official's awareness of a specific risk or from

promises of aid. . . . Promises do not create a special relationship -- custody does." Id.

Although Pinder II rejected the theory that a "special relationship" can exist in a context other than that which involves custody, the Court in Pinder II acknowledged that a police officer could be held liable for injuries to a plaintiff under § 1983 absent a custodial relationship where the police officer created or enhanced a danger faced by an individual. "When the state itself creates the dangerous situation that result[s] in the victim's injury, the absence of a custodial relationship may not be dispositive." Id. at 1177; see also Gibson v. City of Chicago, 910 F.2d 1510, 1521 n. 19 (7th Cir. 1990) (noting that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of or vulnerability to, such violence beyond the level it would have been absent state action.).

In Pinder II, the Fourth Circuit detailed the differences between "creation of the danger" by affirmative misconduct -- where liability exists -- and the failure to protect -- where liability does not exist. The Court stated that "[i]t cannot be said that the state 'commits an affirmative act' or 'creates a danger' every time it does anything that makes injury at the hands of a third party more likely." Pinder II, 54 F.3d at 1175. The Court further noted that "inaction" should not be "artfully recharacterized" as "action" by stretching the concept of "'affirmative acts' beyond the context of immediate interactions between the officer and the plaintiff." Id. at 1176, n.1. Rejecting Pinder's creation of the danger claim, the court noted that "[n]o amount of semantics can

disguise the fact that the real "affirmative act" was committed by Pittman, not by Officer Johnson. As was true in DeShaney, the state did not 'create' the danger, it simply failed to provide adequate protection from it." Id.[9]

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[9] The Fourth Circuit's holding in Pinder II declining to impose a generalized duty upon police to protect individuals from violence is based upon sound public policy considerations worth repeating:

> The recognition of a broad constitutional right to affirmative protection from the state would be the first step down the slippery slope of liability. Such a right potentially would be implicated in nearly every instance where a private actor inflicts injuries that the state could have prevented. Every time a police officer incorrectly decided it was not necessary to intervene in a domestic dispute, the victims of the ensuing violence could bring a § 1983 action. . . Broad affirmative duties thus provide a fertile bed for § 1983 litigation, and the resultant governmental liability would wholly defeat the purposes of qualified immunity.
>
> If the right Pinder asserts were ever clearly established, it would entail other significant consequences. A general obligation of the state to protect private citizens, whether broadly or narrowly conceived, effectively makes law enforcement officials constitutional guarantors of the conduct of others. . . [I]f promises could override the qualified immunity defense, police would quickly learn never to reassure, even in situations where such assurances might be the best

This Court finds that the holding in Pinder II precludes substantive due process liability in this case. First, this Court finds that there was no "special relationship" between Deborah, Amanda, Angela, Scott and James and the Moundsville Police Department that would give rise to a duty to protect. Plaintiffs have pointed to no specific facts that raise a genuine issue that Debra, Amanda, Angela, Scott and James, were in the custody, constructive or otherwise, of the Moundsville Police Department. Counsel for plaintiffs candidly conceded this point at the pretrial conference before this court. (See Transcript, Pre-Trial Conference, March 17, 1997 at p. 20). Further, the Pinder II court explicitly rejected the plaintiffs' argument that, even though custody was not present, a "special relationship" existed due to the promises and assurances made by the Moundsville Police Department to Deborah, Amanda, Angela, Scott and James. Accordingly, absent a custodial situation, Pinder II and DeShaney preclude plaintiffs' claims that a "special relationship" existed that obligated the police department to protect Deborah, Amanda, Angela, Scott and James from Michael's violence.

Further, plaintiffs have not established that the Moundsville Police Department took any affirmative action to create or enhance the danger that existed from Michael's behavior, This Court finds that this case is a quintessential "failure to act" case. The undisputed facts contain specific examples of police inaction: the Moundsville Police Department did not serve a temporary protective order; the

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course of action.

Id. at 1178.

Moundsville Police Department did not advise Deborah on every occasion of her victim's rights; and the Moundsville Police Department did not physically respond to some of Deborah's contacts with them about Michael's behavior. None of these facts, however, show that the police took any affirmative action to increase the danger to Deborah, Amanda, Angela, Scott or James. Rather, the "acts" outlined above, even if negligent, are examples of inaction rather than of intentional affirmative acts. See Daniels v. Williams, 474 U.S. 327, 328 (1986) ("[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."). Although this Court finds that it is possible that the Moundsville Police Department could have taken a more proactive approach to assist Deborah and her family in their difficulties with Michael, this Court finds that the Moundsville Police Department took no affirmative acts to increase the danger to Deborah, Amanda, Angela, Scott and James.

Plaintiffs attempt to avoid the "affirmative act" requirement of a "creation of the danger" theory by asserting that the police ratified and sanctioned Michael's violent behavior by their inaction and thereby increased the danger to Deborah, Amanda, Angela, Scott and James. However, this Court finds that although plaintiffs attempt to slightly alter their "creation of the danger" claim by equating "action" with "ratification and sanctioning," plaintiffs cannot avoid the affirmative act requirement. While plaintiffs' theory that a police department can create or enhance the danger faced by individual by ratifying and sanctioning certain conduct may be viable, this Court finds that plaintiffs are still required to show that the ratification and sanctioning resulted from certain affirmative

police conduct, not just police inaction. Accordingly, plaintiffs' creation of the danger argument, regardless of how it is characterized, must fail.

Further, and in the alternative, even if plaintiffs could show that the Moundsville Police Department acted affirmatively to enhance or create the danger confronted by plaintiffs, plaintiffs have not set forth any specific facts which create a genuine issue for trial that the enhancement or creation of danger resulted from a City of Moundsville policy or custom. The plaintiffs have not presented any specific facts which arguably show that the City of Moundsville had a written or spoken plan of action that directed the officers to respond to Deborah's requests for assistance in the manner in which they did. The plaintiffs have presented no documentation of a specific City policy and have presented no deposition testimony or witness affidavits acknowledging such a policy. In fact, plaintiffs have not pointed to any evidence that would tend to show that the individual officers in this matter did anything but exercise their own discretion in applying the various statutes, regulations and policies governing the treatment of domestic violence situations.

Further, plaintiffs have presented no evidence that the treatment afforded to Deborah, Amanda, Angela, Scott and James was the result of any City custom. Plaintiffs have presented no credible evidence that the alleged failures of the police department with regard to Deborah's situation were part of a persistent and widespread practice so well-settled as to have the force of law. Plaintiffs have presented no deposition testimony, affidavits or documents which convinces this court that there is a genuine issue of material fact that any custom, apart from the written statutes,

regulations, and procedures, existed regarding the treatment of domestic violence cases. Accordingly, this Court finds that defendant's motion for summary judgment on plaintiff's substantive due process claims must be granted.

c. Procedural Due process claims Under 42 U.S.C. § 1983

Plaintiffs argue that the City of Moundsville deprived Deborah, Amanda, Angela, Scott and James of their constitutionally protected property and liberty interests arising from W. Va. Code §§ 48-2A-9(b) and (c) and 48-2A-10c(a)[10] by failing to advise Deborah of certain rights of victims of domestic abuse and by failing to serve the Domestic Violence Temporary Protective Order upon Michael in a timely fashion. W. Va. Code §§ 48-2A-9(b) and (c) provide that:

> (b) Any law-enforcement officer responding to an alleged incident of family violence shall inform the parties thereto of the availability of the possible remedies provided by this article and the possible applicability of

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[10] In their respective complaints, plaintiffs allege that the Moundsville Police Department also violated W. Va. Code §§ 48-2A-9(d) and (i) and 48-2A-10. However, in their response to defendant's motion for summary judgment, plaintiffs do not indicate their intent to rely on any of these additional statutes to support their procedural due process claims. However, assuming plaintiffs intend to advance these statutes as a basis for procedural due process claim, this Court finds that these statutes cannot support a procedural due process claim for the same reasons as set forth in this section.

the criminal laws of this state. Any law-enforcement officer investigating an alleged incident of family violence shall advise the person subject to abuse of the availability of the family protection shelter to which such person may be admitted.

(c) Any law-enforcement officer responding to an alleged incident of abuse shall, in addition to providing the information required in subsection (a) of this section, provide transportation for or facilitate transportation of the victim or victims, upon the request of such victim or victims, to a shelter or the appropriate court where there is reasonable cause to believe that such victim or victims have suffered or are likely to suffer physical injury.

W. Va. Code § 48-2A-10c(a) provides that:

When a law-enforcement officer observes any respondent abuse the petitioner and/or minor children or the respondent's physical presence at any location in knowing and willful violation of the terms of a temporary or final protective order issued by a magistrate, a circuit court judge or a family law master under the provisions of this article or subdivision (12), subsection (a), section thirteen [§ 48-2-13(a) (12)], article two of this chapter granting the relief pursuant to the

> provisions of this article, he or she shall immediately arrest the respondent.

This Court finds that the above statutory provisions do not create an entitlement such that the failure to comply with the statutes amounted to a violation of Deborah, Amanda, Angela, Scott and James' procedural due process rights under the Fourteenth Amendment.

All procedural due process claims are evaluated under a two part inquiry. First, a court must assess whether an "individual possess[es] a protected interest such that the due process protections [are] applicable. . . ." Farthing v. City of Shawnee, 39 F.3d 1131, 1135 (10th Cir. 1994). If so, then the court must inquire whether "the individual [was] afforded an appropriate level of process." Id.

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). While it is clear that a state law may create a liberty or property interest that cannot be taken away without due process of law, it is also true that state laws mandating that certain procedures be followed in certain situations do not automatically create a protected entitlement. See Olim v. Wakinekona, 461 U.S. 238, 250-51 (1983) (state-created procedures do not create an entitlement where none would otherwise exist). Rather, in order to raise a meritorious procedural due process claim based on a liberty or property interest created by a state law, a plaintiff must "show that the procedures that [were not followed] were enacted pursuant to a substantive

constitutional obligation, . . ." Doe by Fein v. District of Columbia, 93 F.3d 861, 868 (D.C. Cir. 1996).

In Doe, the United States Court of Appeals for the District of Columbia Circuit addressed the issue of whether a state law codifying procedures for investigating abuse and neglect created an entitlement to protection from abuse and neglect which could not be taken away without due process of law. In that case, the District of Columbia Prevention of Child Abuse and Neglect Act required that "upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly . . . and, upon a finding of abuse and neglect, immediate steps shall be taken to protect the . . . abused . . . child." Id. at 865. Jane Doe, an abused child, argued that the District of Columbia's failure to investigate a claim of her abuse deprived her of her entitlement to protective services under the statute without due process of law.

Addressing her procedural due process claim, the court first noted that Doe's claim was "severely flawed." Id. at 868. The Court held that in order for the procedures mandated by the District of Columbia statute to give rise to a protected entitlement, the statute must have been enacted pursuant to a "substantive constitutional obligation." Id. The Court found Doe's procedural due process claim to be little more than a recasting of a DeShaney substantive due process claim. Id. Noting that DeShaney rejected the theory that a state can be held liable for a due process violation based upon the failure of the state to protect an individual against private violence, the court held that "by codifying procedures for investigating child abuse and neglect reports, D.C. has not assumed a constitutional obligation to protect children from

such abuse and neglect. The fact that Doe can point to a D.C. statute mandating investigation does not, therefore, convert a meritless substantive due process claim into a fruitful procedural one." Id.

After holding that the statute did not vest an entitlement in Doe, the court further held that, even if Doe could show that she had a liberty or property interest under the statute, Doe could not show that any additional process was due before she could be deprived of her right. Id. Citing a similar Seventh Circuit holding, the Doe court held that Doe had failed to identify a remedy for any procedural violations and had also failed to show that her right to file suit against the District of Columbia was an inadequate remedy. Id. at 869-70 (citing Doe by Nelson v. Milwaukee County, 903 F.2d 499 (7th Cir. 1990). The court stated that "the proper means by which a plaintiff may seek redress for an alleged failure to comply with state and local child protection statutes is an action for damages under state and local law. Id. at 870.

Although plaintiffs seek to distinguish Doe from the instant case, this Court finds that Doe is directly on point and provides a reasonable, logical analysis of this issue. Although this case is a domestic abuse case and not a child abuse, case, the analysis in Doe has a direct application in this context. Here, plaintiffs have alleged that West Virginia state law vested in Deborah, Angela, Amanda, Scott and James two distinct entitlements. First, plaintiffs allege that W. Va. Code §§ 48-2A-9(b) and (c) entitled Deborah, Amanda, Angela, Scott and James, as victims of domestic violence, to be notified by the police of certain remedies available to them. Second, the plaintiffs alleged that under W. Va. Code §§ 48-2A-10c(a) Deborah, Angela, Amanda, Scott and James were

entitled to timely service of the family violence temporary protective order issued against Michael. As did the Court in Doe, this court finds that plaintiff's arguments are flawed.

First, this Court finds that plaintiffs' procedural due process claim is merely a DeShaney claim couched in the language of procedural due process. Plaintiffs' essential argument is that by violating the statutory provisions the Moundsville Police Department did not protect Deborah, Amanda, Angela, Scott and James from Michael and increased the danger that Deborah, Amanda, Angela, Scott and James faced from Michael's behavior. As noted above, although a statute may prescribe and codify certain procedures for dealing with domestic violence and/or child, abuse, the statute does not automatically create an entitlement that can be enforced by individuals. Rather, before the statute can give rise to a constitutionally protected entitlement it must be based on an independent, substantive constitutional right.

DeShaney clearly established that individuals do not have a substantive constitutional interest in receiving protection from the police absent a custodial relationship. Further, as discussed above, Pinder II established that a plaintiff cannot recover on a creation of danger theory simply by pointing to police inaction – in this case, a failure to give information and to timely serve a protective order. Accordingly, because there is not a substantive constitutional right upon which the procedures in the statutes are based, plaintiffs cannot succeed on their procedural due process

In addition to finding that plaintiffs procedural due process claim is based upon a flawed theory, this court finds that plaintiffs' due process claim is factually incorrect. First,

this court finds that the statutes requiring the police to inform a domestic violence victim of available assistance apply only when the police respond to an incident of domestic violence. In this case, the facts show that the police had contact with Deborah, Amanda and Angela when responding to two specific incidences of domestic violence and that Deborah, Amanda and Angola were advised of available assistance at least upon one occasion. However, the police did not at any time have contact with Scott and James in relation to incidences of domestic violence whereby the police would have had an obligation under the statute to inform them of domestic violence assistance programs. Thus, even if Deborah, Amanda and Angela were entitled to be informed of certain remedies under the statute, the police had no obligation under the statute to Jamss and Scott.

Likewise, James and Scott cannot possibly be entitled to any protections under the statute that plaintiffs allege entitle them to timely service of the temporary protective order. Arguably Deborah may have been entitled to timely service of the temporary protective order because the order specifically prohibited Michael from contacting her. However, a review of this order indicates that James and Scott were not named in the order and the order did not prohibit Michael from having contact with them. Additionally, this Court finds that it is arguable that Amanda and Angela were not entitled to service of the protective order because the order did not prohibit Michael from having contact with them.

Further, this court finds that the plaintiffs' construction of W. Va. Code § 48-2A-10c(a) to create an interest in timely service of a protective order is erroneous. Assuming that the statute does create a liberty or property

interest, the interest created by the statute is not the interest that plaintiffs assert. The statute indicates that a police officer must arrest a person immediately if the person violates the terms of a protective order. The statute does not address, in any manner whatsoever, the service of a protective order. Accordingly, the statutory provision cited by plaintiffs cannot possibly entitle them to timely service of a protective order.

In the alternative, assuming that plaintiffs have adequately alleged a property or liberty interest arising from the above statutes, this Court finds that plaintiffs have not created a genuine issue of material fact as to the post-deprivation procedures that should have been afforded to Deborah, Angela, Amanda, Scott and James before they were deprived of their constitutional rights. Where the alleged deprivation of a liberty or property interest is not made pursuant to an established state procedure, the existence of an adequate post-deprivation remedy under state tort law is all the process that is due. Doe, 93 E.3d at 868. Here, plaintiffs have not suggested what post-deprivation procedure could have been employed to protect the interests of Deborah, Amanda, Angela, Scott and James. Further, plaintiffs have not indicated that their right to sue the City of Moundsville for an unconstitutional deprivation is an inadequate remedy. Accordingly, as the Court found in Doe, this court finds that the post-deprivation remedy of a lawsuit for damages is an adequate post-deprivation remedy that sufficiently protects plaintiffs' alleged entitlement. Id. at 870 ("[T]he proper means by which a plaintiff may seek redress for an alleged failure to comply with state or local child protection statutes is an action for damages under state and local law.").

Finally, and in the alternative, assuming that plaintiffs have shown that they have been wrongfully deprived of a constitutionally protected interest, this Court finds that plaintiffs have failed to show that this wrongful deprivation stems from a City of Moundsville custom or policy. As previously discussed, in order to impute liability upon a municipality for a civil rights violation, it must be shown that a municipal policy or custom must be the "moving force" behind the violation. Spell, 824 F.2d at 1387. Here, plaintiffs have presented no specific facts to dispute the defendant's position that the deprivation, if any, was not the result of a policy or custom. Accordingly, this Court finds, as a matter of law, that any deprivation of Deborah, Amanda, Angela, Scott and James' procedural due process rights cannot be attributable to the City of Moundsville.

d. Equal Protection Claims Under 42 U.S.C. § 1983

It has been repeatedly held that "[although there is no general constitutional right to police protection, the State may not discriminate in providing such protection." Watson v. City of Kansas City, 857 F.2d 690, 694 (10th Cir. 1988). In equal protection cases where it is alleged that police have provided less protection to victims of domestic violence based upon their status as either victims of domestic violence or as women, courts have applied a three-prong test to determine if the Equal Protection Clause has been violated by police conduct. "[I]n order to survive summary judgment, a plaintiff must go beyond the pleadings and submit specific facts that demonstrate that [(1) a] policy or custom of the [police] to provide less police protection to victims of domestic assault than to other assault victims [or to provide

less police protection to women than to men exists; (2)] that discrimination was a motivating factor for the defendants and [(3)] that he or she was injured by operation of the policy or custom." Hakken v. Washtenaw County, 901 F. Supp. 1245 (E.D. Mich. 1995); Watson, 857 F.2d at 694 (applying test to claim of discrimination on the basis of status as domestic violence victim); Hynson by and through Hyson v. City of Chester, 864 F.2d 1026 (3d Cir. 1988) .

Plaintiffs dispute that the above-stated test applies in cases where an equal protection claim is based upon a claim of discrimination on the basis of classification as victims of domestic abuse. However, this Court disagrees and finds that the test applies equally to cases based upon discrimination against victims of domestic abuse as well as in cases based upon discrimination against women. See, e.g., Watson, supra. (applying test to equal protection challenge made on the basis of classification of victim of domestic abuse). Further, plaintiffs argue that this standard announced in Hakken should not be adopted by this Court and that other courts have applied the less stringent standard as announced in Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984) and Bartelowe v. County of Berrien, 643 F. Supp. 574 (W.D. Mich. 1986). This Court finds, however, that Thurman and Berrien are not persuasive because both cases base equal protection recovery upon an affirmative duty to protect and both cases predate the United States Supreme Court decision in DeShaney which established that, absent certain circumstances, the police do not have an affirmative duty to protect. Further, this Court finds that the majority of circuit courts have applied the aforementioned three-prong test and that the stringent standards imposed [by the test] are more in keeping with the Supreme Court's approach to equal

protection challenges to facially neutral policies." Soto v. Flores, 103 F.3d 1056,1068 (1st Cir. 1997). Accordingly, this Court will apply the above three-prong test to plaintiffs' equal protection claims in this case.

Plaintiffs further argue that with regard to alleged discrimination based upon their status as victims of domestic abuse, they are not required to prove discriminatory intent because the custom of the police in rendering police protection was "facially discriminatory" to victims of domestic violence. This Court finds that this argument is meritless as a matter of law. The Supreme Court of the United States has held that a plaintiff in any equal protection case has the burden of proving discriminatory intent. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977). While the plaintiff need not prove that a discriminatory intent was the sole motivating factor, the plaintiff must show that a discriminatory purpose was a motivating factor. Id. "'Discriminatory purpose'. . . implies more than an intent as volition or intent as awareness of consequences. . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Admin. v. Feeney, 442 U.S. 256, 279 (1976). There can be no "negligent" violations of an individual's right to equal protection. Only deliberate discrimination violates the equal protection clause. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir 1983), cert. denied, 465 U.S. 1049 (1984). Discriminatory intent can be difficult to prove. "Without the smoking gun of an overtly discriminatory statement by a decision maker, it may be very difficult to offer sufficient

proof of such a [discriminatory] purpose." Soto, 103 F.3d at 1067.

Additionally, plaintiffs' claim of a "facially discriminatory custom" is also without factual support]. To the extent that plaintiffs claim the written policy of the Moundsville Police Department was discriminatory, plaintiffs' own expert, Dr. Lee Weinberg, stated in his report that the Moundsville Police Department's policy for handling domestic violence calls was "a modern and proper written policy for the procedures for handling domestic violence and protective orders." This Court has also reviewed the policy and finds that it does not facially discriminate against persons on the basis of their status as victims of domestic violence. Further, a "custom" by its very nature is unwritten -- it is a course of practice rather than a written procedure. Thus, it is not possible for the "custom" of the Moundsville Police Department to be "facially" discriminatory. Accordingly, this Court finds that, although plaintiffs argue otherwise, the alleged custom of the Moundsville Police Department is facially neutral and, therefore, the plaintiffs must prove discriminatory intent in order to withstand summary judgment on their equal protection claim.

Having now determined what test must be applied to plaintiffs' equal protection claim, this Court now turns to an assessment of the undisputed facts under the Hynson test and finds that plaintiffs have failed to establish that the City intended to discriminate against Deborah as a woman or against Deborah, Angela, Amanda, Scott and James as victims of domestic violence in rendering its protective services. Plaintiffs have presented no evidence by documentation, affidavit or otherwise, or any discriminatory motive. This

Court's review of the record reveals that the Plaintiffs have no factual basis upon which to base any allegation of discriminatory intent. Although plaintiffs' expert engaged in an analysis of police records and concluded that the Moundsville Police Department responded to other crimes in a different manner than to crimes of a domestic nature, plaintiffs' expert has given no opinion regarding whether this alleged differential treatment is the product of a discriminatory motive.

Further, and in the alternative, assuming that plaintiffs could raise a genuine issue of material fact that a discriminatory motive did in fact, exist, the plaintiffs have failed to point to any specific facts which show that the discriminatory intent is imputable to the City by virtue of a policy to custom. As previously noted, the plaintiffs admit, through their expert, that the written policy of the Moundsville Police Department was proper. With regard to any police "custom," this Court's review of the record has uncovered no evidence that shows that any unfair or discriminatory behavior on the part of individual police officers is the result of a City-endorsed custom. Accordingly, this Court finds that, because piaintiffs have pointed to no facts which create a genuine issue of material fact that the Moundsville Police Department had a discriminatory motive in its method of responding to Deborah, Amanda, Angela, Scott and James, and because any allegedly discriminatory behavior was not the result of a City policy or custom, defendant's motion for summary judgment on plaintiffs' equal protection argument must be granted.

3. State Law Tort Claims

Under West Virginia law, "[a] political subdivision is immune from [tort] liability if a loss or claim results from . . . the failure to provide, or the method of providing, police [or] law enforcement . . . protection . . . ." W. Va. Code § 29-12A-5(a) (5). In Beckley v. Crabtree, 428 S.E.2d 317 (W. Va. 1993), the Supreme Court of Appeals of West Virginia defined the phrase "method of providing police . . . protection" as "the formulation and implementation of policy related to how police . . . protection should be provided." Id. at 321. The court further held that when considering whether a political subdivision is immune under the statute, the Court should determine "whether the allegedly negligent act resulted from the manner in which a formulated policy regarding such protection was implemented" Id.

In Randall v. City of Fairmont Police Dept., 412 S.E.2d (W. Va. 1991), the West Virginia Supreme Court of Appeals clarified that the immunity provision contained in W. Va. Code § 29-12A-S(a) (5) is not absolute. Noting that liability of a local government entity for nondiscretionary functions cannot be predicated upon a breach of a general duty owed to the public as a whole, the court held that a political subdivision is not immune from the police and a particular person has been established. Id. at 347. The court then repeated the four-part "special relationship" test previously announced by the ccurt in Wolfe v. City of Wheeling, 387 S.E.2d 307, 311 (W. Va. 1989) :

> To establish that a special relationship exists between a local government entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by

> the local government entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

In Wolfe, the court elaborated upon the requirements for establishing a "special relationship." The court stated that the fourth element, justifiable reliance, provided "the essential causative link between the special duty assumed by the local governmental entity and the injury." Id. The court indicated the significance of the reliance prong of the test noting that it enabled the court to impose liability where the municipality had "lulled the injured party into a false sense of security . . . induced him either to relax his own vigilance or to forego other available avenues of protection." Id. The court further noted that the element requiring "direct contact" was necessary in order to show that a "special relationship" existed beyond that "relationship with the government that all citizens share in common," and that the direct contact requirement served to "rationally limit[] the class of individuals to whom the local governmental entity's 'special duty' extends." Id. at 311-12.

This Court finds that the City of Moundsville is entitled to judgment as a matter of law on plaintiffs' state tort claims. The City, a municipal corporation, is protected by the immunity provisions of the West Virginia statute. Plaintiffs

have failed to establish that a "special relationship" existed between Deborah, Amanda, Angela, Scott and James and the City of Moundsville which would make the statute inapplicable.

First, this Court finds that the tort immunity provision of W. Va. Code § 29-12A-5(a) applies in this case. Plaintiffs first argue that this action does not fall under the statute because plaintiffs seek to hold the City liable for its failure to provide "adequate" police protection rather than to provide "any" police protection. However, this Court finds that this is a distinction without a difference. This Court finds that the statute does not distinguish, nor does any case interpreting the statute distinguish, between a case alleging inadequate police protection and no police protection. Accordingly, this court finds that the plaintiffs' allegations in the complaint places this action directly within the purview of the statute.

Plaintiffs further argue that the City cannot invoke the protections of the statute because this action does not implicate the "method" by which police protection was provided. Rather, plaintiff's state that this action concerns "the negligent implementation of [the police department's] domestic abuse policy." (Plaintiffs' Memorandum of Law in Opposition to Motion for Summary Judgment filed February 14, 1997, p. 31). As noted above, the West Virginia Supreme Court in Beckley stated that "method" as used in the statute contemplated the "formulation and implementation" of police policy. Beckley, 428 S.E.2d at 321. Accordingly, to the extent that plaintiffs' claims seek recovery for the failure to properly implement certain policies, this Court finds that the immunity statute applies to those claims as well.

Because this Court has found that the immunity statute applies to this action, this court must next consider whether a "special relationship" existed between Deborah, Angela, Amanda, Scott and James and the City such that the City's immunity under the statute does not exist in this case. This court finds, however, that plaintiffs have failed to show there is a genuine issue of material fact that a "special relationship" existed.

This court finds that plaintiffs has failed to show that Deborah, Amanda, Angela, Scott and James "justifiably relied" on any alleged promises or affirmative acts made by the police. As noted above, liability based upon a special, relationship can exist only where the police have taken some action to create in an individual a false sense of security, have caused an individual to relax his own vigilance or have caused an individual to forego other available avenues of protection. Wolfe, 387 S.E.2d at 311. The undisputed facts in this case establish that Deborah did not relax her own vigilance or forego other available avenues of protection based upon any assurances made or actions taken by the Moundsville Police Department. After Deborah was attacked by Michael, she went to live with her mother in Wheeling; she did not stay at the house in Moundsville relying on he assumption that the Moundsville police would protect her. Further, when Deborah went to the house at 22 Oak Avenue, she went with two adult males, one of whom was carrying a firearm. Clearly, Deborah did not rely on past promises or assurances made by the police as the basis for her protection. Rather Deborah took other measures to attempt to ensure her safety.

Likewise, this Court finds that the undisputed facts establish that Scott and James did not rely on the police for

protection against Michael. The facts establish that when Scott went to the 22 Oak Avenue residence, he took a loaded firearm with him. Further, the plaintiffs have not pointed to any evidence which shows that James had been involved in any way with the police regarding Michael's behavior. Thus, this Court finds that the plaintiffs cannot successfully allege that James or Scott justifiably relied upon the Moundsville Police Department for protection. With regard to Amanda and Angela, this court finds that plaintiffs have cited no specific facts that would create a genuine issue of material fact that either Amanda or Angela justifiably relied on the police for protection. Accordingly, this Court finds that plaintiffs have failed to create a question of material fact as to the last prong of the "special relationship" test.

Further, this Court finds that Scott and James' state tort law claims must fail because plaintiffs have failed to establish that Scott and James had "direct contact" with the Moundsville Police Department. No reliable evidence has been presented by the parties which shows that James or Scott had any contact with the police concerning Michael's conduct. Although plaintiffs argue that the "direct contact" requirement does not apply to Scott and James, this Court declines to adopt plaintiffs' view of the Wolfe test because such a construction of the test would directly contradict the West Virginia Supreme Court's intent to narrowly limit "special relationship" liability to circumstances here the police do in fact have actual contact with an individual. See Wolfe, 412 S.E.2d at 312. Further, although it may be true Deborah contacted the police for the benefit of the "rest of the world" in addition to herself, this Court finds that Deborah's intentions to elicit police protection for others is irrelevant to the special relationship test. Finally, this Court finds that an

alleged awareness by the police that James and Scott were being threatened by Michael is not enough to establish "direct contact" under the test. Accordingly, this court finds that the state law claims of James and Scott must fail on this ground as well and that plaintiffs' state law tort claims must be denied.

Finally, and in the alternative, this Court finds that even if plaintiffs' state law claims are sufficient to withstand defendant's motion for summary judgment, plaintiffs' state law claims should be dismissed pursuant to 28 U.S.C. § 1367(c)(3). 28 U.S.C. § 1367 provides a federal court with supplemental jurisdiction over state law claims that "are so related to [federal] claims in the action . . . that they form the same case or controversy." 28 U.S.C.§ 1367(a). However, a district court may decline to exercise supplemental jurisdiction over a state law claim over which it has original jurisdiction. . . ." 28 U.S.C. § 136(c)(3). Whether to dismiss supplemental claims is within the discretion of the district court. Shanahan v. Cahill, 58 F.3d 106 (4th Cir. 1995). Because this Court has summarily disposed of all of plaintiffs' claims over which this Court has original jurisdiction, this Court finds, in its discretion that the state law claims, in the event that the claims have merit, should be dismissed without prejudice.

VI. Conclusion

Based on the above discussion, this Court GRANTS defendant's motion for summary judgment on all counts. These consolidated actions are DISMISSED and STRICKEN from the active docket of this Court.

The Clerk is directed to transmit copies of this order to counsel of record herein.

ENTERED: April 28, 1997

/s/_____
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

No. _____

In The

Supreme Court of the United States

CHARLES LEE SEMPLE, JR.,
Administrator of the Estate of Deborah Louise Semple, Deceased, et al.,

Petitioners,

v.

THE CITY OF MOUNDSVILLE,
a Municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari accurately identifies the parties to the instant proceeding.

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I. RELEVANT FACTS

The instant appeal arises out of the tragic murder of Deborah Semple ("Deborah"), her brother Scott Semple, and her friend James Garrison by Deborah's estranged companion, Michael Suarez ("Suarez") on August 6, 1994, in Moundsville, West Virginia. Suarez subsequently committed suicide, and this entire sequence of events occurred in the presence of the couple's two young daughters.

Although the couple began living together in 1982, the record establishes no admissible evidence of police involvement in the couple's personal affairs until January 15, 1989. J.A., Vol. III, 1321. On that date, after an alleged encounter with Suarez and after consulting with the City of Moundsville Police Department ("Moundsville Police"), Deborah filed misdemeanor battery charges against Suarez in Marshall County Magistrate Court. J.A., Vol. III, 318. Ten days later, Deborah requested the charges be "withdrawn." J.A., Vol. III, 319. Accordingly, upon motion by the Marshall County Assistant Prosecuting Attorney, Magistrate Mark A. Kerwood dismissed the charge against Suarez. J.A., Vol. III, 320. For almost five and a half years, no further problems between the two were reported to the City of Moundsville or its agencies.

After the couple's separation in May 1994, Deborah contacted the Moundsville Police from a pay phone located at the Gast News Stand in Moundsville on June 21, 1994, to report a domestic situation. J.A., Vol. I, 26, 58, 80; J.A., Vol. V, 2060 at "0438." The Moundsville Police responded immediately and assisted Deborah in removing the children from the home; however, Deborah stated that

she did not wish to have Suarez arrested. J.A., Vol. III, 1185-88. In addition, the responding officers did not witness any "credible corroborative evidence" which would have empowered a warrantless arrest of Suarez. J.A., Vol. III, 1185-88. *See also*, W.Va. Code § 48A-2A-14(b)(1-4). That evening, the officers advised Deborah of her rights as an alleged victim of domestic violence and provided her with a copy of the Moundsville Police Department Victims Information Sheet. J.A., Vol. I, 374. After being assisted by the Moundsville Police, Deborah filed a Family Violence Petition at the Magistrate Office, and Magistrate Kerwood issued a Family Violence Temporary Protective Order ("Temporary Order"). J.A., Vol. I, 321-23.

Magistrate Kerwood conducted a "final hearing" on the complaint on June 24, 1994, and although Suarez did not appear at the hearing, the Magistrate awarded Suarez limited visitation rights with the couple's children through arrangements to be made with third parties. Suarez, however, was prohibited from contacting Deborah. J.A., Vol. I, 331-32.

Shortly after midnight on June 27, 1994, the Moundsville Police received a call from Patricia Scott,[1] requesting officer assistance at Deborah's home. The Moundsville Police responded immediately, and upon arrival at the residence learned that Suarez had broken a window, gained entry to the residence, and attacked Deborah. J.A., Vol. III, 1196-99. Suarez was arrested and charged with three offences in violation of West Virginia Code: (1) Felony Wanton Endangerment with the Use of a

---

[1] Deborah's mother, now known as Patricia Rogers.

Firearm; (2) Felony Malicious Assault; and (3) Misdemeanor Stalking. J.A., Vol. I, 336-38. Suarez was then arraigned before Magistrate William Anderson, and bond was set at $75,000. J.A., Vol. I, 339. After bond was posted, Suarez was released from custody on July 1, 1994. J.A., Vol. I, 341. Upon learning Suarez had "made bail," the Moundsville Police Department unsuccessfully attempted to notify Deborah. Unable to reach her, the Department notified both Deborah's mother and father of Suarez's release. J.A., Vol. I, 346-47.

From the time of Suarez's release on July 1, 1994, until July 7, 1994, the Moundsville Police received no reports of physical violence against Deborah. However, on July 3, 1994, Deborah's father, Charles Semple, Jr., ("Mr. Semple"), called the Moundsville Police and advised that Suarez had been verbally abusive during a telephone call. J.A., Vol. IV, 1554-59. In response, Officer Murray went to Mr. Semple's residence and, after ascertaining Suarez had made no threats against Deborah, advised Mr. Semple to contact a magistrate and have the protective order expanded to include his residence as a "protected location." *Id.* Thereafter, Mr. Semple contacted Magistrate David Buzzard, who advised Mr. Semple that "nothing could be done." J.A., Vol. III, 1365-66.

On July 6, 1994, Deborah contacted the Moundsville Police from a telephone with a Wheeling exchange and reported that Suarez had been telephonically harassing her, her father, her babysitter, and her housekeeper. J.A., Vol. I, 354 at 1948-53. Arrangements were made for Deborah to report these potential violations to Magistrate Kerwood, who had issued the protective order. *Id.*

On July 7, 1994, prior to her scheduled appearance in front of the Marshall County Grand Jury, Deborah met with a Marshall County Assistant Prosecuting Attorney and the Prosecuting Attorney's Office's Investigator. During that meeting, Deborah stated her belief that Suarez did not pose a threat of violence and was a good father, and added that she did not wish Suarez further incarcerated. J.A., Vol II, 668-73. After the trio discussed potential options regarding Suarez's alleged telephonic harassment, Deborah was advised by the Assistant Prosecuting Attorney to file a criminal complaint for violation of the Domestic Violence Final Order. J.A., Vol. II, 619-23, 676-80. Taking this advice, Deborah filed a Criminal Complaint on July 7, 1994. J.A., Vol. I, 357. Based upon the verified complaint, Magistrate Buzzard issued a warrant for Suarez's arrest. J.A., Vol. V, 2246. Responding immediately to the warrant, the Moundsville Police arrested Suarez, and he was lodged in jail pending arraignment. J.A., Vol. IV, 1537-44.

Later that same evening, Officer Murray transported Suarez to Magistrate Court for arraignment. J.A., Vol. IV, 1547. There, Magistrate Mark Kerwood – who had dismissed the 1989 battery charge and had issued both the Family Violence Temporary Protective Order of June 21, 1994, and the Family Violence Final Protective Order of June 23, 1994 – released Suarez on a "personal recognizance" bond. J.A., Vol. IV, 1548. Upon learning that Kerwood had set nominal bond and *before* Suarez was released from custody, Officer Murray immediately approached the magistrate and questioned the propriety of such low bond. J.A., Vol. IV, 1549-52. Kerwood refused to change the bond, instead only asking Murray to "keep

an eye" on Deborah that evening. J.A., Vol. IV, 1551. When Deborah's father questioned Magistrate Kerwood about the recognizance bond on the following day, Kerwood replied, "I screwed up." J.A., Vol. III, 1367.

On July 13, 1994, the Moundsville Police received an anonymous call which advised that Suarez had gone to Deborah's former residence and vandalized the screen door. Upon receiving the call, the Moundsville Police responded within six minutes and notified Deborah's father, who informed the police that Deborah was no longer residing at that address. *Id.*; J.A., Vol. I, 361. Two hours after the anonymous call, Deborah called the Moundsville Police and learned that Suarez had not been arrested. J.A., Vol. I, 362. Other than this incident, from the time of Suarez's arrest on July 7, 1994, until August 6, 1994, no other contact occurred between the Moundsville Police and Deborah or Suarez.

On August 6, 1994, sometime before 1:30 p.m., Deborah, her two children, Scott Semple (who was armed with a .45 caliber automatic handgun), and a friend, James Garrison ("James") went to the residence to remove some remaining items. J.A., Vol. II, 562-65. At approximately 1:30 p.m., the Moundsville Police received a phone call from Deborah, reporting her belief that Suarez had vandalized the home. J.A., Vol. I, 370. Significantly, she advised that no police were requested or required. J.A., Vol. III, 1260-61. Approximately four minutes later, a young girl called from the home. J.A., Vol. I, 370; Vol. III, 1259-60. Almost immediately, Deborah got on the phone, explaining that one of her daughters had hit the re-dial button and stating that police assistance was unnecessary. *Id.*

At 1:43 p.m., Deborah made a frantic call, advising that Suarez was in the house. J.A., Vol. I, 370-71; Vol. III, 1262-64. Arriving at the residence at 1:46 p.m., only three minutes after Deborah's call, the Moundsville Police discovered Deborah, Suarez, Scott, and James dead, all the victims of gunshot wounds. J.A., Vol. III, 1263-64; J.A., Vol. II, 563-65.

II. FACTUAL ERRORS CONTAINED IN PETITION

Respondents submit that many assertions made by Petitioners are completely false or supported only by inadmissible hearsay evidence, which may not be properly considered by this Court. Respondent has brought these inaccuracies and improper references to the attention of the Petitioners and the lower courts in various pleadings, and, even more significantly, the District Court's Order recognized many of these improprieties. However, these assertions are again repeated in the instant Petition.

For example, in the Petition, it is asserted that Deborah decided to drop the 1989 misdemeanor battery charges against Suarez due to threats of violence by Suarez. This contention is supported only by inadmissible "double hearsay" and thus cannot be considered by this Court in the instant appeal.

Petitioners have also asserted that between January 1989 and June 1994, Deborah and her mother frequently contacted the police regarding Suarez's alleged violence. However, this evidence was found inadmissible by the District Court, and Petitioners have not appealed this finding; therefore, this Court cannot properly consider

this "evidence" for the purpose of this Petition.[2] In the instant Petition, the Petitioners represent that the Family Violence Temporary Protective Order of June 21, 1994, prohibited Suarez from contacting Deborah and her "mother and family." This "statement of fact" simply is not factual. J.A., Vol. V, 2450, n.6. Not only does the clear language of the Order not provide such relief, but United States District Judge Frederick P. Stamp, Jr., noted in his written opinion that while the Temporary Order prohibited Suarez " . . . from contacting, telephoning, communicating, harassing, or verbally abusing Petitioner [Deborah] . . . ," the Order *does not* reference Deborah's mother or family. J.A., Vol. I, 324-26.[3]

Additionally, at page 13 of the Petition, it is asserted that in August 1994, Deborah put her house up for sale and "accepted a $500 down payment for the house from a Wheeling couple." (Pet. 13) While this assertion of fact is not material, the record contains absolutely no evidence supporting this allegation.

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[2] *See*, J.A. Vol. V, 2449-50, n.5. Judge Stamp stated in pertinent part: " . . . Defendant challenges these statements by Patricia Rogers as inadmissible hearsay that cannot be considered by the Court when deciding the motion for summary judgment. This Court agrees that . . . [these] statements concerning the number of times Deborah and her mother called the Moundsville Police Department during the years from 1987 through 1994 are hearsay statements. . . . "

[3] *See*, J.A., Vol V, 2450, n.6, wherein Judge Stamp states, " . . . [A]fter reviewing the . . . Order (cites omitted), this court cannot find any reference to Deborah's mother or family in the order. . . . The actual Family Violence Temporary Protective Order . . . does not grant that relief."

Petitioners also assert that the record before the Court reveals evidence that certain unnamed Moundsville Police officers escorted Deborah to her house a few days before her murder in order to help her pack some belongings. The District Court, when presented with this information, found this evidence inadmissible hearsay, and Petitioners have not cited the District Court's ruling as error. Thus, Respondent submits this "evidence" should not be considered for the purposes of this Petition. J.A., Vol. V, 2449-50, n.5.

Finally, contrary to Petitioners' representations, the Moundsville Police made numerous efforts to serve Suarez with the Temporary Order, including patrolling areas often frequented by Suarez and waiting outside Deborah's residence. J.A., Vol. III, 1192-93; Vol. IV, 1595-97, 1653-56. In fact, on June 23, 1994, at 8:19 p.m., Suarez was advised telephonically by Officer Lyons of the Moundsville Police Department of the Temporary Order. J.A., Vol. I, 329 at "2019-30"; Vol. III, 1193-94.

In short, despite having been apprised by both counsel for the Respondents and the lower courts of inaccuracies in their arguments, the instant Petition contains numerous assertions which are inadmissible or simply false.

III. DISCUSSION

A. THE MOUNDSVILLE POLICE'S ACTIONS DO NOT DEMONSTRATE DELIBERATE INDIFFERENCE AND THUS DO NOT CONSTITUTE SUFFICIENT GROUNDS TO FIND THAT DEBORAH SEMPLE'S FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED.

Petitioners' argument that the Fourth Circuit erred because the City of Moundsville enhanced or created a

danger is fatally flawed. Their position is an attempt to avoid the established principal that inaction on the part of a state body *does not give rise to civil liability when such inaction allegedly causes harm. DeShaney v. Winnebago County DSS*, 499 U.S. 189, 195 (1989). Notwithstanding the general rule that the government has no duty to protect its citizens, *DeShaney* and its progeny have set out two exceptions: the "special relationship" theory and the "state-created danger" theory. Under the former, the state has a duty to protect an individual under its care, custody, or control when the state has removed one's ability to care for oneself. *See, DeShaney*, 489 U.S. at 199-201. Under the "state-created danger" theory of liability, a duty to protect emerges after the state *affirmatively* places an individual in a position of danger that the individual would not otherwise have faced. *See, e.g., Greer v. Shoop*, 141 F.3d 824, 827-28 (8th Cir. 1998). The clear rationale behind this "state-created danger" theory is that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *DeShaney*, 499 U.S. at 199-200. Restated, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.*

Recent law from the Fourth Circuit reveals that a theory of recovery based upon a "special relationship" or

a "creation of danger" is inapplicable absent some sort of custodial relationship or affirmative action. *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995), *cert. denied*, 516 U.S. 994 (1995). Significantly, Petitioners neither claim nor does the admissible evidence in this case provide a scintilla of evidence that Respondent placed any Petitioner or his/her decedent(s) in a custodial situation. Further, as discussed *infra*, Petitioners cannot establish the essential element of their claim that any of their alleged constitutional deprivations arose from a municipal policy that was the "moving force" behind their injuries. *See, Bd. of Co. Comm'rs of Bryan Co., Oklahoma v. Brown*, 520 U.S. 1283 (1997). Interestingly, Petitioners no longer argue that a "special relationship" existed between the parties, and instead now focus entirely upon a "creation of danger" theory. To do so, however, is a fatal flaw. In *Pinder, supra*, when discussing the issue of non-custodial "special relationships," the Fourth Circuit stated definitively that absent a custodial relationship, a "special relationship" giving rise to police or municipal liability for alleged constitutional violations does not arise:

> *Promises* do not create a special relationship – custody does. Unlike custody, a promise of aid does not actually place a person in a dangerous position and then cut off all outside sources of assistance. Promises from state officials can be ignored if the situation seems dire enough, whereas custody cannot be ignored or changed by the person it affects.

Pinder, 54 F.3d at 1175 (emphasis added). Here, no party disputes that neither Petitioners nor their decedents were, at any time relevant, in the custody or under the control of Respondent.

Although Petitioners attempt to distinguish the principles set forth in *Pinder* by asserting that in the instance case more than a single promise was made, *Pinder* draws no such distinction. In fact, the *Pinder* Court expressly states that *promises* do not create a special relationship. Moreover, Petitioner's sole reference to any record evidence in support of their "creation of danger" argument, other than the opinion of their expert, is an inadmissible hearsay statement attributed to Suarez that he felt "in triumph" over the Moundsville Police. (Pet. 21-22.) Even assuming *arguendo* that this statement could be properly considered by this Court, it is insufficient to establish that the Respondent created the danger which led to the events of August 6, 1994. As such, the lower courts did not err in holding that Petitioners' substantive due process rights were not violated.

Petitioners' argument is also flawed because Respondent did not affirmatively place the Petitioners or their decedents in a position of danger. The mere fact that the state is aware that a person is in danger does not create a duty to protect, even if the state expresses a willingness to protect the victim. *DeShaney*, at 197-98, n.4. The state, instead, *must take some action* which places the victim(s) in a dangerous position, increases the potential danger, or deprives the victim of his/her ability to use self-help. 857 F. Supp. 1203, 1209. As stated *supra*, promises do not constitute "affirmative action."

In support of their arguments, Petitioners cite, *inter alia*, *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984), for the proposition that affirmative duties arise *not* because the state limited freedom of personal action but because the state "selects" an individual and places him in a position

of danger. *Id.* at 194. Significantly, Petitioners fail to reveal that the *DeShaney* Court, having cited this case and several others like it, said in no uncertain terms, "We reject this argument." 489 U.S. at 197-98, n.4.

Petitioners' reliance upon *Gardner v. Reed*, 986 F.2d 1122 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993), is also misplaced, and its holding, in fact, bolsters Respondent's position. The *Reed* Court found that the police created a danger by removing a sober driver from a vehicle, allowing an intoxicated passenger to become the vehicle's operator. The intoxicated driver thereafter became involved in an accident, injuring other individuals. In other words, the state action of removing the sober driver from a vehicle and leaving an intoxicated passenger in the car foreseeably and affirmatively created a danger. However, in the instant matter, the most that can arguably be said is that the Respondent failed to adequately protect Petitioners from a known danger, Michael Suarez. This simply is insufficient to give rise to liability.

Petitioners' reliance upon *Smith v. City of Elyira*, 857 F. Supp. 1203 (N.D.Oh. 1994), *Sadrud-Din v. City of Chicago*, 883 F. Supp. 270 (N.D.Ill. 1995), and *Dwares v. City of New York*, 985 F.2d 94, 99-100 (2d Cir. 1993), is also misplaced. Contrary to Petitioner's contention that the *City of Elyira* Court denied summary judgment with respect to a substantive due process claim "consistent" with the facts in the instant case, instead, the *Elyira* Court held the City could be liable for the actions of its officers if the alleged constitutional violations were caused by affirmative acts done pursuant to an official policy or custom. Specifically, the Court found:

> . . . [T]he facts here support a claim that the police officers' affirmative acts created or increased the danger to Karen Guerrant. The police officers did not merely fail to perform their duties; *they told Alfred Guerrant that he did not have to leave, and advised him to go back if Karen tried to throw him out.* Thus, this case is more akin to the facts in *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277 (6th Cir. 1987), in which the police authorized an inmate to use a marked patrol car, and the inmate used the apparent authority of the police to stop an automobile and murder the occupants. Here, Alfred used the apparent authority given to him by the police to remain in his ex-wife's home against her will, and later killed her.

Id. at 1210 (emphasis added). Here, however, the Moundsville Police did not knowingly leave Suarez with Deborah, did not tell Suarez that he did not need to leave Deborah's residence, and never advised Suarez to return to Deborah if she threw him out. Thus, the facts of *City of Elyira* and its holding are inapposite to those in the instant case, where the only alleged affirmative acts taken by the Moundsville Police are no more than "mere promises."

The case of *Sarud-Din, supra,* is also inapposite. *Sarud-Din* involved a City of Chicago police officer's murder of his wife. In finding that the City acted affirmatively, the Court gave great weight to the fact that the victim was murdered by an officer using a weapon issued by the City despite the City's knowledge of the officer's repeated threats to kill his wife. More specifically, the *Sarud-Din* Court found that the City had acted affirmatively, not only by training and outfitting its employee

with the means to exercise deadly force, but also by failing to reclaim the weapon even after the City's awareness that its employee was unfit to exercise police authority. *Id.* at 278. No such comparison can be made to the instant case.

In *Dwares, supra,* it was alleged that police officers not only stood by idly while plaintiffs were beaten, but also (1) "skinheads" conspired with the police, (2) the police *personally* witnessed the attack and did nothing, and (3) a "skinhead" told a reporter that the police had given them license to attack a plaintiff. *Id.* at 99-100. Significantly, while the Court recognized the propriety of claims against the individual officers, the Rule 12(b)(6) dismissal of § 1983 claims against the *municipality* was upheld.

Certainly, in *Dwares,* the alleged "affirmative acts" were far more egregious than those alleged in the instant case. At worst, the record in this case, where no individual police officer has been sued, may establish isolated instances of police officer *inaction* resulting from the exercise of an individual officer's discretion. Finally, no evidence supports Petitioners' contention that any affirmative action taken by the Moundsville Police was in furtherance of an unconstitutional municipal custom or policy that created a danger to the Petitioners. In fact, as discussed *infra,* Petitioners have failed to show any unconstitutional custom or policy of the Moundsville Police.

Thus, for the foregoing reasons, the Fourth Circuit did not err in affirming the District Court's ruling that

under the facts of this case, the Respondent is not liable for alleged § 1983 violations.

B. THE FOURTH CIRCUIT DID NOT ERR IN HOLDING THAT JAMES GARRISON AND SCOTT SEMPLE MAY NOT MAINTAIN CLAIMS FOR PROCEDURAL DUE PROCESS VIOLATIONS UNDER § 1983.

Although the lower courts have denied all of Petitioners' procedural due process claims, only those of James Garrison and Scott Semple have been cited as error in the instant Petition. Specifically, the courts *sub judice* dismissed Petitioners' procedural due process claims, *inter alia,* because the statutory provisions upon which they relied do not create an entitlement.

To maintain a meritorious procedural due process claim based upon a liberty or property interest created by a state law, a plaintiff must "show that the procedures that [were not followed] were enacted pursuant to a substantive constitutional obligation. . . . " *Doe by Fein v. District of Columbia,* 93 F.3d 861, 868 (D.C. Cir. 1996). Analysis of this type of claim, as noted by the United States District Court, is as follows:

> [a]ll procedural due process claims are evaluated under a two part inquiry. First, a court must assess whether an "individual possess[es] a protected interest such that the due process protections [are] applicable. . . . " *Farthing v. City of Shawnee,* 39 F.3d 1131, 1135 (10th Cir. 1994). If so, then the court must inquire whether "the individual [was] afforded an appropriate level of process."

J.A., Vol. V, 2471.

Petitioners attempt to establish this right by claiming entitlement under W.Va. Code § 48-2A-9(b) and (c) and § 48-2A-10(c). More specifically, Petitioners James Garrison and Scott Semple contend that the Moundsville Police failed to comply with entitlements to timely service of domestic violence protective order and notification of remedies available to domestic violence victims. However, even if the Moundsville Police failed to comply with W.Va. Code § 48-2A-9(b) and (c) and § 48-2A-10(c)(a), this failure does not create a "property right" on behalf of these Petitioners. As noted by the United States District Court:

> . . . although a statute may prescribe and codify certain procedures for dealing with domestic violence . . . , the statute does not automatically create an entitlement that can be enforced by individuals. Rather, before the statute can give rise to a constitutionally protected entitlement, it must be based on an independent, substantive constitutional right.

J.A., Vol. V, 2474. Absent a custodial relationship, individuals do not have a substantive constitutional interest in receiving protection from the police. *DeShaney*, 499 U.S. at 195. Moreover, the Fourth Circuit established in *Pinder II* that a plaintiff cannot recover on a creation of danger theory simply by pointing to police inaction, such as a failure to give information and to timely serve a protective order.

In order for a due process entitlement to exist, some contact between the state and the individuals claiming the deprivation must be established. Petitioners gloss

over the fact that the record is void of even a scintilla of evidence of any contact between James or Scott and the Moundsville Police which would give rise to any entitlement to procedural due process rights. As such, the Petitioners' claims of a violation of procedural due process violations must fail.

Further, procedural due process depends upon whether the state statutory scheme protects a *substantive* constitutional right of the plaintiff. *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983). Since the *substantive* interests here at issue – protection from private violence from Suarez – have been rejected by the lower courts and since neither James nor Scott has assigned error to the same, Petitioners cannot claim alleged deprivations of the procedures designed to protect a non-enforceable right.

As noted by the United States District Court, *Doe v. District of Columbia*, 93 F.3d 868 (D.C. Cir. 1996), is directly on point. As this Court is aware, both the Fourth Circuit and the District Court have held both James' and Scott's substantive due process claims are "fundamentally without merit" because neither was in the custody of the Moundsville Police as required under *Pinder*. Moreover, neither have shown that the police created or enhanced the danger faced by the two. Finally, neither James nor Scott have presented evidence sufficient to create an issue of genuine material fact that the actions taken by the police which allegedly increased the danger resulted from a custom or policy of the Moundsville Police.

Most significantly, the District Court found that the two men's procedural due process rights were not violated because the above-referenced statutes simply did

not apply to them. However, the Court found five (5) additional reasons for denial of Petitioners' claims:

(1) The W.Va. Statutes cited by plaintiffs as the basis for the procedural due process claim do not give rise to a liberty or property interest protected by the Fourteenth Amendment;

(2) Even if the statutes required advising Deborah of available assistance, thereby providing her with a property interest, she was, in fact, advised of said rights upon at least one occasion;

(3) Petitioners failed to show that the Family Violence Temporary Protective Order vested in Deborah any cognizable property interest in having the order served upon Suarez and receiving police protection;

(4) Petitioners failed to establish that Scott or James had a cognizable property interest under the protective order; and

(5) Petitioners failed to show that any failure to advise Scott or James of available assistance and to serve the protective order was a result of a municipal custom or policy.

Similarly, the Fourth Circuit found that there was no evidence of direct contact between James and Scott and the police. (Pet. App. 12a) Accordingly, the Petitioners' argument that they possessed a procedural due process entitlement which was violated by the Moundsville Police must be rejected.

C. THE 4TH CIRCUIT DID NOT ERR IN RECOGNIZING THAT THE RECORD DOES NOT CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO THE EXISTENCE OF A MUNICIPAL POLICY OR CUSTOM OF THE MOUNDSVILLE POLICE DEPARTMENT WHICH COULD COMPRISE A CONSTITUTIONAL VIOLATION.

Petitioners' third and final argument is that the Fourth Circuit erred in holding that the record in this case does not create a genuine issue of material fact regarding the existence of an unconstitutional municipal custom or policy. Proof of an unconstitutional policy or custom is absolutely essential to Petitioners' case, because, to impose liability, Petitioners must prove the existence of an official custom or policy that caused a deprivation of a constitutional right. *Monell v. New York City Dept. Of Social Services*, 436 U.S. 658, 694 (1978).

Without question, the domestic violence policy of the Moundsville Police is not at issue, for Petitioners' expert, Lee S. Weinberg, admits that the Moundsville Police's domestic violence policy was "very good."

> Q: . . . The policy itself you say is a very good policy? Is that correct?
>
> A: It is indeed.

J.A. Vol. IV, 1837. Instead, Petitioners rely entirely upon Dr. Weinberg's opinion that the Moundsville Police's custom of not properly training its officers regarding domestic violence constitutes a possible unconstitutional custom. However, applying well-settled law to the instant facts shows this argument is flawed.

First, a plaintiff must point to a specific deficiency and not a general ineffectiveness of the training to maintain a deprivation of constitutional rights. *Spell v. McDaniel*, 824 F.2d 1380, 1390 (4th Cir. 1987). Only those deficiencies in police training policies that result from policymaker fault of at least the degree of deliberate indifference to or reckless disregard for the constitutional rights of persons within police force jurisdiction can give rise to municipal liability; mere negligence on the part of policymakers is not sufficient. *Id.* Further, the Fourth Circuit has stated that a municipality can only be said to have been deliberately indifferent to a training need:

> . . . if, in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights. . . .

Jordan v. Jackson, 15 F.3d 333, 341 (4th Cir. 1994) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

Petitioners' expert, Dr. Weinberg, admits that the Moundsville Police's provision of eight (8) hours of domestic violence training for its officers was "good."

> Q: . . . But the fact that there's eight hours of training, you say, is more than adequate in terms –
>
> A: I didn't say adequate. *I said it's good.*

J.A. Vol. IV, p. 1837 (emphasis added).

In fact, Petitioners' sole attempt to specify deficiencies in training are based upon Dr. Weinberg's criticism,

which is based upon the deposition testimony of unidentified officer(s) who allegedly did not have specific recollections of certain documents being distributed during training and their failure to " . . . know what was told to them with respect to a particular issue." J.A. Vol. IV, 1837. Manifestly, such criticism, at worst, can rise to no more than a general ineffectiveness of training and is certainly insufficient to the level of "deliberate indifference to a training" necessary to maintain a § 1983 claim and establish liability upon the City of Moundsville.

In conclusion, as noted by the Fourth Circuit, when the facts of this case are viewed in the light most favorable to Petitioners, the most that could possibly be proven is " . . . that there *may* have been a general ineffectiveness in training." [Pet. 10a, 11a (emphasis added)]. For these reasons, Petitioners' argument that the Moundsville Police maintained an unconstitutional custom should be rejected.

IV. CONCLUSION

For the foregoing reasons, Respondent, the City of Moundsville, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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